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REPORTS OF CASES

DETERMINED IN THE

**APPELLATE COURTS
OF ILLINOIS**

WITH A DIRECTORY OF THE JUDICIARY OF THE STATE,
CORRECTED TO JUNE 29, 1906.

**VOL. CXXI
A. D. 1906**

LAST FILING DATES OF REPORTED CASES:

FIRST DISTRICT, OCTOBER 6, 1905;

THIRD DISTRICT, JULY 10, 1905.

EDITED BY

W. CLYDE JONES AND KEENE H. ADDINGTON,

AUTHORS OF JONES & ADDINGTON'S SUPPLEMENTS TO
STARR & CURTIS'S ANNOTATED ILLINOIS STATUTES.

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Rec. Sept. 17, 1906

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BOOK COMPOSITION
CHICAGO

DIRECTORY OF THE JUDICIARY DEPARTMENT OF THE STATE OF ILLINOIS.

CORRECTED TO JUNE 29, 1906.

The judiciary department of the State of Illinois is composed of (1) the Supreme Court; (2) Appellate Courts; (3) Circuit Courts; (4) Courts of Cook County; (5) City Courts; (6) County and Probate Courts.

(1) THE SUPREME COURT.

The Supreme Court consists of seven justices, elected for a term of nine years, one from each of the seven districts into which the State is divided.

Formerly the State was divided into three grand divisions, Southern, Central and Northern, in which the terms were held, with one clerk for each of the three grand divisions elected for a term of six years, the court sitting at Mt. Vernon, Springfield and Ottawa.

In 1897 these divisions were consolidated into one comprising the entire State, and provision made that all terms of the court be held in the city of Springfield, on the first Tuesday in October, December, February, April and June of each year.

REPORTER.

ISAAC N. PHILLIPS.....Bloomington.

JUSTICES.

First District—ALONZO K. VICKERS.....Vienna.

Second District—WILLIAM M. FARMER.....Vandalia.

Third District—JACOB W. WILKIN.....Danville.

Fourth District—GUY C. SCOTT.....Aledo.

Fifth District—JOHN P. HAND.....Cambridge.

Sixth District—JAMES H. CARTWRIGHT.....Oregon.

Seventh District—ORRIN N. CARTER.....Chicago.

The Chief Justice is chosen by the court annually at the June term. The rule of the court is to select as successor to the presiding justice the justice next in order of seniority who has not served as Chief Justice within six years last past. Mr. Justice Scott is the present Chief Justice.

CLERK.

CHRISTOPHER MAMER, Springfield.

LIBRARIAN.

RALPH H. WILKIN, Springfield.

(2) APPELLATE COURTS.

These Courts are held by Judges of the Circuit Courts assigned by the Supreme Court for a term of three years. One clerk is elected in each district.

REPORTERS.

W. CLYDE JONES and KEENE H. ADDINGTON, comprising the law firm of Jones & Addington, 100 Washington street, Chicago.

FIRST DISTRICT.

Composed of the county of Cook.

Court sits at Chicago on the first Tuesdays of March and October.

CLERK—Alfred R. Porter, Ashland Block, Chicago.

FRANCIS ADAMS, Presiding Justice, Ashland Block, Chicago.

JESSE HOLDOM, Justice, Ashland Block, Chicago.

EDWARD O. BROWN, Justice, Ashland Block, Chicago.

BRANCH APPELLATE COURT.*

FIRST DISTRICT.

FREDERICK A. SMITH, Presiding Justice, Ashland Block, Chicago.

FRANK BAKER, Justice, Ashland Block, Chicago.

HENRY V. FREEMAN, Justice, Ashland Block, Chicago.

APPELLATE COURTS—(Continued.)

SECOND DISTRICT.

Composed of the counties of Boone, Bureau, Carroll, DeKalb, DuPage, Grundy, Henderson, Henry, Iroquois, Jo Daviess, Kane, Kankakee, Kendall, Knox, Lake, LaSalle, Lee, Livingston, Marshall, McHenry, Mercer, Ogle, Peoria, Putnam, Rock Island, Stark, Stephenson, Warren, Whiteside, Will, Winnebago and Woodford.

Court sits at Ottawa, La Salle county, on the first Tuesdays in April and October.

CLERK—Christopher C. Duffy, Ottawa.

DORRANCE DIBELL, Presiding Justice, Joliet.

GEORGE W. THOMPSON, Justice, Galesburg.

HENRY B. WILLIS, Justice, Elgin.

THIRD DISTRICT.

Composed of the counties of Adams, Brown, Calhoun, Cass, Champaign, Christian, Clark, Coles, Cumberland, DeWitt, Douglas, Edgar, Ford, Fulton, Greene, Hancock, Jersey, Logan, Macon, Macoupin, Mason, McDonough, McLean, Menard, Montgomery, Morgan, Moultrie, Piatt, Pike, Sangamon, Schuyler, Scott, Shelby, Tazewell and Vermillion.

Court sits at Springfield, Sangamon county, on the third Tuesdays in May and November.

CLERK—W. C. Hippard, Springfield.

FRANK D. RAMSAY, Presiding Justice, Morrison.

JAMES S. BAUME, Justice, Galena.

LESLIE D. PUTERBAUGH, Justice, Peoria.

* This court is a branch of the Appellate Court of the first district, and is held by three judges of the Circuit Court, designated and assigned by the Supreme Court under the provisions of the act of the General Assembly, approved June 2, 1897. Hurd's Statutes, 1897, 508, Laws of 1897, 185.

FOURTH DISTRICT.

Composed of the counties of Alexander, Bond, Clay, Clinton, Crawford, Edwards, Effingham, Fayette, Franklin, Gallatin, Hamilton, Hardin, Jackson, Jasper, Jefferson, Johnson, Lawrence, Madison, Marion, Massac, Monroe, Perry, Pope, Pulaski, Randolph, Richland, Saline, St. Clair, Union, Wabash, Washington, Wayne, White and Williamson.

Court sits at Mount Vernon, Jefferson county, on the fourth Tuesdays in February and August.

CLERK—Albert C. Millspaugh, Mount Vernon.

COLOSTIN D. MYERS, Presiding Justice, Bloomington.

JAMES A. CREIGHTON, Justice, Springfield.

HARRY HIGBEE, Justice, Pittsfield.

(3) CIRCUIT COURTS.

Exclusive of Cook county, the State of Illinois is divided into Seventeen Judicial Circuits, as follows:*

First Circuit.—The counties of Alexander, Pulaski, Massac, Pope, Johnson, Union, Jackson, Williamson and Saline.

JUDGES.

† ALONZO K. VICKERS, Vienna.

WARREN W. DUNCAN, Marion.

WILLIAM N. BUTLER, Cairo.

Second Circuit.—The counties of Hardin, Galatin, White, Hamilton, Franklin, Wabash, Edwards, Wayne, Jefferson, Richland, Lawrence and Crawford.

JUDGES.

ENOCH E. NEWLIN, Robinson.

PRINCE A. PEARCE, Carmi.

JACOB R. CREIGHTON, Fairfield.

Third Circuit.—The counties of Randolph, Monroe, St. Clair, Madison, Bond, Washington and Perry.

JUDGES.

BENJAMIN R. BURROUGHS, Edwardsville.

ROBERT D. W. HOLDER, Belleville.

CHARLES T. MOORE, Nashville.

Fourth Circuit.—The counties of Clinton, Marion, Clay, Fayette, Effingham, Jasper, Montgomery, Shelby and Christian.

JUDGES.

† WILLIAM M. FARMER, Vandalia.

TRUMAN E. AMES, Shelbyville.

SAMUEL L. DWIGHT, Centralia.

Fifth Circuit.—The counties of Vermilion, Edgar, Clark, Cumberland and Coles.

JUDGES.

JAMES W. CRAIG, Mattoon.

E. R. E. KIMBROUGH, Danville.

MORTON W. THOMPSON, Danville.

Sixth Circuit.—The counties of Champaign, Douglas, Moultrie, Macon, DeWitt and Piatt.

JUDGES.

WILLIAM G. COCHRAN, Sullivan.

OLON PHILBRICK, Champaign.

WILLIAM C. JOHNS, Decatur.

* Laws 1897, 188.

† Resigned. Elected Judge Supreme Court June 4, 1906.

Seventh District.—The counties of Sangamon, Macoupin, Morgan, Scott, Greene and Jersey.

JUDGES.

JAMES A. CREIGHTON, Springfield.

ROBERT B. SHIRLEY, Carlinville.

OWEN P. THOMPSON, Jacksonville.

Eighth Circuit.—The counties of Adams, Schuyler, Mason, Cass, Brown, Pike, Calhoun and Menard.

JUDGES.

HARRY HIGBEE, Pittsfield.

THOMAS N. MEHAN, Mason City.

ALBERT AKERS, Quincy.

Ninth Circuit.—The counties of Knox, Warren, Henderson, Hancock, McDonough and Fulton.

JUDGES.

GEORGE W. THOMPSON, Galesburg.

JOHN A. GRAY, Canton.

ROBERT J. GEIER, Monmouth.

Tenth Circuit.—The counties of Peoria, Marshall, Putnam, Stark, and Tazewell.

JUDGES.

LESLIE D. PUTERBAUGH, Peoria.

THEODORE N. GREEN, Pekin.

NICHOLAS E. WORTHINGTON, Peoria.

Eleventh Circuit.—The counties of McLean, Livingston, Logan, Ford and Woodford.

JUDGES.

COLOSTIN D. MYERS, Bloomington.

GEORGE W. PATTON, Pontiac.

THOMAS M. HARRIS, Lincoln.

Twelfth Circuit.—The counties of Will, Kankakee and Iroquois.

JUDGES.

DORRANCE DIBELL, Joliet.

ALBERT O. MARSHALL, Watseka.

FRANK L. HOOPER, Joliet.

Thirteenth Circuit.—The counties of Bureau, LaSalle and Grundy.

JUDGES.

CHARLES BLANCHARD, Ottawa.

SAMUEL C. STOUGH, Morris.

RICHARD M. SKINNER, Princeton.

Fourteenth Circuit.—The counties of Rock Island, Mercer, White-side and Henry.

JUDGES.

WILLIAM H. GEST, Rock Island.

FRANK D. RAMSAY, Morrison.

EMERY C. GRAVES, Geneseo.

Fifteenth Circuit.—The counties of Jo Daviess, Stephenson, Carroll, Ogle and Lee.

JUDGES.

RICHARD S. FARRAND, Dixon.

JAMES S. BAUME, Galena.

OSCAR E. HEARD, Freeport.

Sixteenth Circuit.—The counties of Kane, Du Page, De Kalb and Kendall.

JUDGES.

HENRY B. WILLIS, Elgin.
CHARLES A. BISHOP, Sycamore.
LINUS C. RUTH, Hinsdale.

Seventeenth Circuit.—The counties of Winnebago, Boone, McHenry and Lake.

JUDGES.

ARTHUR H. FROST, Rockford.
CHARLES H. DONNELLY, Woodstock.
ROBERT W. WRIGHT, Belvidere.

(4) COURTS OF COOK COUNTY.

The State Constitution recognizes Cook county as one judicial circuit, and establishes the Circuit, Criminal and Superior Courts of said county. The Criminal Court has the jurisdiction of a Circuit court in criminal and *quasi*-criminal cases only, and the judges of the Circuit and Superior Courts are judges, *ex officio*, of the Criminal Court.

CIRCUIT COURT.

ACTING CLERK—James J. Gray, Fort Dearborn Building, Chicago.

JUDGES.

GEORGE A. CARPENTER,
RICHARD S. TUTHILL,
RICHARD W. CLIFFORD,
FRANK BAKER,
FRANCIS ADAMS,
THOMAS G. WINDES,
MERRITT W. PINCKNEY,

JOHN GIBBONS,
EDWARD O. BROWN,
LOCKWOOD HONORE,
GEORGE KERSTEN,
JULIAN W. MACK,
FREDERICK A. SMITH,
CHARLES M. WALKER.

SUPERIOR COURT.

CLERK—Charles W. Vall, Fort Dearborn Building, Chicago.

JUDGES.

JOSEPH E. GARY,
BEN M. SMITH,
THEODORE BRENTANO,
GEORGE A. DUPUY,
ALBERT C. BARNES,
ARTHUR H. CHETLAIN,

HENRY V. FREEMAN,
FARLIN Q. BALL,
AXEL CHYTBUS,
JESSE HOLDOM,
MARCUS KAVANAGH,
WILLARD M. McEWEN.

(5) CITY COURTS.

City Courts existing prior to the Constitution of 1870 were continued until abolished by the qualified voters of the city. These courts may now be established under Sec. 21 of Chap. 37, R. S., and when so established have concurrent jurisdiction within the city, with the Circuit Courts, in all civil and criminal cases, except treason and murder, and in appeals from justices of the peace residing within the city. (*Hercules Iron Works v. E., J. & E. Ry. Co.*, 141 Ill., 497.)

THE CITY COURT OF ALTON.

JAMES E. DUNNEGAN, Judge. FRANCIS BRANDEWEIDE, Clerk.

THE CITY COURT OF AURORA.

JOHN L. HEALY, Judge. FRANK W. GREENAWAY, Clerk.

THE CITY COURT OF CANTON.

P. W. GALLAGHER, Judge. W. S. GLEASON, Clerk.

THE CITY COURT OF CHICAGO HEIGHTS.

HOMER ABBOTT, Judge. EDWARD H. KIRGIS, Clerk.

THE CITY COURT OF EAST ST. LOUIS.

W. J. N. MOYERS, Judge. THOMAS J. HEALY, Clerk.

THE CITY COURT OF ELGIN.

JOHN L. HEALY, Judge. CHARLES S. MOTE, Clerk.

THE CITY COURT OF LITCHFIELD.

PAUL MCWILLIAMS, Judge. HARRY L. BALLARD, Clerk.

THE CITY COURT OF MATTOON.

HORACE S. CLARK, Judge. THOMAS M. LYTLE, Clerk.

THE CITY COURT OF PANA.

JOSIAH P. HODGE, Judge. DELOSS TRAVIS, Clerk.

THE CITY COURT OF ZION CITY.

V. V. BARNES, Judge. O. L. SPRECHER, Clerk.

(6) COUNTY AND PROBATE COURTS.

In the counties of Cook, Kane, La Salle, Peoria, Sangamon, St. Clair and Will, each having a population of over 70,000, probate courts are established, distinct from the county courts. In the other counties the county courts have jurisdiction in all matters of probate. (Laws 1881, 72.)

JUDGES.	COUNTIES.	COUNTY SEATS.
CHARLES B. MCCROBY.....	Adams.....	Quincy.
WILLIAM S. DEWEY.....	Alexander.....	Calro.
JOSEPH STORY.....	Bond.....	Greenville.
WM. C. DE WOLF, JR.....	Boone.....	Belvidere.
S. A. HUBBARD.....	Brown.....	Mt. Sterling.
JOE A. DAVIS.....	Bureau.....	Princeton.
F. L. BIZAILLON.....	Calhoun.....	Hardin.
ALVA F. WINGERT.....	Carroll.....	Mt. Carroll.
DARIUS N. WALKER.....	Cass.....	Virginia.
CALVIN C. STALEY.....	Champaign.....	Urbana.
JAMES H. FORRESTER.....	Christian.....	Taylorville.
EVERETT CONNELLY.....	Clark.....	Marshall.
JOHN R. BONNEY.....	Clay.....	Louisville.
JAMES ALLEN.....	Clinton.....	Carlyle.
T. N. COFER.....	Coles.....	Charleston.
JOHN W. HOUSTON.....	Cook.....	Chicago.
CHARLES S. CUTTING, PRO. J.....	Cook.....	Chicago.
AUSBY L. LOWE.....	Crawford.....	Robinson.
STEPHEN B. RABIDEN.....	Cumberland.....	Toledo.
WILLIAM L. POND.....	DeKalb.....	Sycamore.
FRED C. HILL.....	DeWitt.....	Clinton.
WILLIAM W. REEVES.....	Douglas.....	Tuscola.
MAZZINI SLUSSER.....	DuPage.....	Wheaton.
WALTER S. LAMON.....	Edgar.....	Paris.
ISAAC W. IBBOTSON.....	Edwards.....	Albion.
DAVID L. WRIGHT.....	Effingham.....	Effingham.
BEVERLY W. HENRY.....	Fayette.....	Vandalia.
H. H. KERR.....	Ford.....	Paxton.
JAMES P. MOONEYHAM.....	Franklin.....	Benton.
W. SCOTT EDWARDS.....	Fulton.....	Lewistown.
MARSH WISEHEART.....	Gallatin.....	Shawneetown.
DAVID F. KING.....	Greene.....	Carrollton.
GEORGE W. HUSTON.....	Grundy.....	Morris.
CHAS. B. THOMAS.....	Hamilton.....	McLeansboro.
JOHN W. WILLIAMS.....	Hancock.....	Carthage.
MARCELLES L. TYER.....	Hardin.....	Elizabethtown.
RUFUS F. ROBINSON.....	Henderson.....	Oquawka.
THEBON H. CHESLEY.....	Henry.....	Cambridge.
FRANK HARRY.....	Iroquois.....	Watseka.
WILLARD F. ELLIS.....	Jackson.....	Murphysboro.
I. D. SHAMHART.....	Jasper.....	Newton.
CONRAD SCHUL.....	Jefferson.....	Mt. Vernon.
CHARLES S. WHITE.....	Jersey.....	Jerseyville.
WILLIAM RIPPIN.....	Jo Daviess.....	Galena.
W. Y. SMITH.....	Johnson.....	Vienna.
M. O. SOUTHWORTH.....	Kane.....	Geneva.
JOHN H. WILLIAMS, PRO. J.....	Kane.....	Geneva.
ARTHUR W. DESELM.....	Kankakee.....	Kankakee.
WILLIAM HILL.....	Kendall.....	Yorkville.
J. D. WELSH.....	Knox.....	Galesburg.

JUDGES.	COUNTIES.	COUNTY SEATS.
DEWITT L. JONES.....	Lake.....	Waukegan.
WILLIAM H. HINEBAUGH.....	LaSalle.....	Ottawa.
ALBERT T. LARDIN, Pro. J.....	LaSalle.....	Ottawa.
JASPER D. MADDING.....	Lawrence.....	Lawrenceville.
ROBERT H. SCOTT.....	Lee.....	Dixon.
CHARLES F. H. CARITHERS.....	Livingston.....	Pontiac.
DONALD MCCORMICK.....	Logan.....	Lincoln.
ORPHEUS W. SMITH.....	Macon.....	Decatur.
JOHN B. VAUGHN.....	Macoupin.....	Carlinville.
JOHN E. HILLSKOTTER.....	Madison.....	Edwardsville.
CHAS. H. HOLT.....	Marion.....	Salem.
DANIEL H. GREGG.....	Marshall.....	Lacon.
JAMES A. MCCOMAS.....	Mason.....	Havana.
LANNES P. OAKES.....	Massac.....	Metropolis.
WILLIAM J. FRANKLIN.....	McDonough.....	Macomb.
ORSON A. GILLMORE.....	McHenry.....	Woodstock.
ROLLAND A. RUSSELL.....	McLean.....	Bloomington.
GEORGE B. WATKINS.....	Menard.....	Petersburg.
WILLIAM T. CHURCH.....	Mercer.....	Aledo.
ALBERT C. BOLLINGER.....	Monroe.....	Waterloo.
M. J. MCMURRAY.....	Montgomery.....	Hillsboro.
CHARLES A. BARNES.....	Morgan.....	Jacksonville.
E. D. HUTCHINSON.....	Moultrie.....	Sullivan.
FRANK E. REED.....	Ogle.....	Oregon.
WILBERT I. SLEMMONS.....	Peoria.....	Peoria.
MARK M. BASSETT, Pro. J.....	Peoria.....	Peoria.
R. W. S. WHEATLEY.....	Perry.....	Pinckneyville.
F. M. SHONKWILER.....	Piatt.....	Monticello.
B. T. BRADBURN.....	Pike.....	Pittsfield.
WILLIAM A. WHITESIDE.....	Pope.....	Golconda.
JOHN D. BRISTOW.....	Pulaski.....	Mound City.
HENRY C. MILLS.....	Putnam.....	Hennepin.
S. LOVEJOY TAYLOR.....	Randolph.....	Chester.
JOHN A. MACNEIL.....	Richland.....	Olney.
ELWIN E. PARMENTER.....	Rock Island.....	Rock Island.
JOHN L. THOMPSON.....	Saline.....	Harrisburg.
GEORGE W. MURRAY.....	Sangamon.....	Springfield.
CLARENCE A. JONES, Pro. J.....	Sangamon.....	Springfield.
H. V. TEEL.....	Schuyler.....	Rushville.
JAMES CALLANS.....	Scott.....	Winchester.
THOMAS H. RICHTER.....	Shelby.....	Shelbyville.
BRADFORD F. THOMPSON.....	Stark.....	Toulon.
JOHN B. HAY.....	St. Clair.....	Belleville.
FRANK PERRIN, Pro. J.....	St. Clair.....	Belleville.
ANTHONY J. CLARITY.....	Stephenson.....	Freeport.
JESSE BLACK, Jr.....	Tazewell.....	Pekin.
MONROE C. CRAWFORD.....	Union.....	Jonesboro.
FRED DRAFER.....	Vermillion.....	Danville.
SILAS Z. LANDES.....	Wabash.....	Mt. Carmel.
T. G. PEACOCK.....	Warren.....	Monmouth.
LEWIS BERNREUTER.....	Washington.....	Nashville.
JOHN R. HOLT.....	Wayne.....	Fairfield.
JOHN N. WILSON.....	White.....	Carmi.
HENRY C. WARD.....	Whiteside.....	Morrison.
DWIGHT C. HAVEN.....	Will.....	Joliet.
JOHN B. FITHIAN, Pro. J.....	Will.....	Joliet.
W. F. SLATER.....	Williamson.....	Marion.
RUFUS C. BAILEY.....	Winnebago.....	Rockford.
THOMAS KENNEDY.....	Woodford.....	Eureka.

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CASES
DETERMINED IN THE
FIRST DISTRICT
OF THE
APPELLATE COURT OF ILLINOIS,
DURING THE YEAR 1905.

Schwarzschild & Sulzberger v. Louis Goldstein.

Gen. No. 11,940.

1. **FORM OF ACTION**—*how determined in justice court.* The form of an action instituted before a justice of the peace is what the evidence makes it.

2. **MALICE**—*how question as to whether, is gist of action, determined.* Where the action in question was instituted before a justice of the peace, such question cannot be determined as a matter of law from an inspection of the docket of the justice but must be ascertained by resort to the evidence heard in the cause.

3. **CAPIAS**—*when improperly used.* The plaintiff in an action of tort may elect whether he have an execution against the body of the defendant or against his goods and chattels, and having had an execution against the goods and chattels of the defendant, the subsequent issue of a *capias* against his body is without jurisdiction and void.

4. **HABEAS CORPUS**—*when proper remedy.* *Habeas corpus* is the proper remedy by which to seek discharge from arrest under a void *capias*.

Action of replevin. Appeal from the County Court of Cook County; the Hon. ORRIN N. CARTER, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed May 29, 1905.

Statement by the Court. Appellant sued appellee in replevin before a justice of the peace. The writ of replevin was returned property not found. The plaintiff, May 22, 1903, the defendant, Goldstein, not appearing, called for a

jury of six, and the jury, after hearing evidence, rendered the following verdict:

"We, the jury, find the issues for the plaintiff and also find that the defendant fraudulently took and fraudulently and with intent then and there to cheat and defraud the plaintiff on the eighth day of May, 1903, at Chicago, Illinois, converted to his own use six barrels of beef tongues, the property of the plaintiff, of the value of one hundred and forty-seven dollars, and assess the plaintiff's damages at the sum of one hundred and forty-seven dollars in trover."

The form of the verdict was prepared by the attorney for the plaintiff, presumably with the approval of the justice. The justice rendered the following judgment:

"Whereupon it is considered by the court that the said plaintiff have and recover of and from the said defendant the said sum of one hundred and forty-seven dollars *in tort* for its damages in form as by the jury assessed, with costs."

May 23, 1903, on affidavit made by plaintiff's agent, execution was issued against the goods and chattels of the defendant, and was delivered to a constable, and was returned the same day endorsed: "No property found, no part satisfied." October 19, 1903, the plaintiff sued out from the justice and delivered to a constable a writ of *capias ad satisfaciendum* or execution against the body of the defendant, on which writ the defendant was arrested.

October 20, 1903, the defendant petitioned the County Court to be discharged from imprisonment in pursuance of the act concerning insolvent debtors, (Hurd's Rev. Stat. 1903, p. 1045) alleging that he was not guilty of fraud or malice, and that October 5, 1903, he obtained from the United States District Court a discharge in bankruptcy, and that the plaintiff's debt was included in his schedule. The plaintiff answered, denying these averments, and such proceedings were had that a jury found the defendant, Goldstein, not guilty, and judgment for costs was rendered against the plaintiff, from which judgment this appeal is.

Schwarzschild & Sulzberger v. Goldstein.

WHEELER, SILBER & ISAACS, for appellant.

ELIJAH N. ZOLINE, for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

Appellant's attorney, before a jury was called, offered in evidence the justice's transcript, and moved the court, on the transcript, to remand the appellee to custody, which motion the court overruled. Counsel cite numerous cases to the effect that whether malice is the gist of an action must be determined by inspection of the record; that is, by inspection of the pleadings, showing what the issues were. The cases cited are all cases in courts of record, in which, consequently, pleadings are required, and have no application whatever to cases before justices of the peace, in which there are no written pleadings. Counsel for appellant correctly say that, in the court of a justice of the peace the action is what the evidence makes it, citing *Blattau v. Evans*, 57 Ill. App., 311; *Block v. Blum*, 33 ib., 644; *Steele v. Hill*, 35 ib. 211, and *Swingley v. Haynes*, 22 Ill. 214. This being true, the County Court could not determine, from the transcript of the proceedings before the justice, what the nature of the action was, or whether malice was of the gist of the action; because the evidence before the justice is not preserved in the transcript, or in any other way. Therefore, the court properly refused to grant appellant's motion. Moreover, appellee was entitled, under section 5 of the Insolvent Debtor's Act, to have the question whether he was guilty of fraud, as counsel charge, tried by jury.

Counsel contend that the verdict is against the weight of the evidence, and that some of the instructions are erroneous; but we do not think it necessary to discuss these contentions, as we think the judgment must be affirmed on a ground not discussed by counsel. The action was for a tort, as clearly appears from the evidence, and as appellant's counsel claim. Section 3 of article 11 of the act in relation to justices of the peace and constables is as follows: "Upon all judgments in actions of tort, or where the defendant is in

custody, or has been held to bail upon a *capias*, as provided in this act, the justice may issue an execution against the body or goods and chattels of the defendant, at the election of the plaintiff." Hurd's Stat. 1903, p. 1167. Election is "the act of choosing." As used in the law, it is thus defined: "Law: The choice made by a party of two alternatives, by taking one of which the chooser is excluded from the other." Webster's Dictionary. The word election is generally used, in the law, in a case where a party has two inconsistent remedies; but no question as to inconsistent remedies can arise under section 3, because the section expressly mentions two things and requires the plaintiff to elect between the two, namely, between an execution against the body and an execution against the goods and chattels of the defendant. The section cannot be otherwise understood, without practically eliminating from it the words "or" and "election," which would be contrary to the fundamental rule that effect must be given, if possible, to every word of a statute. Had the legislature intended that a plaintiff should, in cases *ex delicto*, have both remedies, it would have been so expressed, as in the case of a fine imposed by a justice, in the exercise of his criminal jurisdiction.

Sections 7 and 8 of article 18, chapter 79, authorize the justice, when a fine is imposed, to issue, first, execution against the goods and chattels of the defendant, and, if the same shall be returned *nulla bona*, to issue a *capias* against the body of the defendant. Hurd's Stat. 1903, p. 1173.

The transcript of the proceedings before the justice, in this case, was put in evidence by appellant, and shows that May 23, 1903, the appellant caused an execution to be issued against the goods and chattels of appellee. This was an election, and, therefore, the *capias* issued October 19, 1903, was unauthorized by law. While appellee might have been discharged on *habeas corpus*, and perhaps such was the proper remedy, appellant is not in a position to object to the remedy pursued, and substantial justice having been done by the judgment discharging appellee from imprisonment, the judgment will be affirmed.

Affirmed.

Howison v. Ruprecht.

Bessie L. Howison v. Martha J. Ruprecht, et al.**Gen. No. 11,952.**

1. **CROSS-BILL—when should be filed.** A cross-bill should be filed without delay, and the court after it has lost jurisdiction of the decree entered upon the original bill has no power to entertain such a proceeding.

2. **CROSS-BILL—when filing of, should not be permitted.** A cross-bill should not be permitted to be filed when there has been an unreasonable delay in presenting the same.

Bill for accounting. Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed May 29, 1905.

Statement by the Court. March 4, 1896, David Robinson and others filed a bill against Martha J. Ruprecht, formerly Martha J. Robinson, Charles E. Robinson, Jr., Bessie L. Robinson and Nathan S. Robinson, claiming to be the heirs at law of Curtis E. Robinson, who died April 20, 1892, seized in fee simple of certain described real estate situated in Cook County, Illinois. The bill alleges that complainants and Nathan S. Robinson are the sole heirs at law of said deceased, and that the defendants, except Nathan S. Robinson, claim to be the sole heirs of the deceased; that on the death of Curtis E. Robinson, Martha J. Ruprecht, claiming that she and the other defendants were such heirs, and assuming to act for herself and as guardian of Curtis E. Robinson, Jr., took possession of all of said real property, procured attornments from persons occupying the same, and collected the rents and profits thereof, and claims that she and said other defendants have ever since remained in such possession and collected said rents; that the deceased, about June 14, 1860, was lawfully married to Mary J. Jennison, and that said marriage relation continued undissolved till December 21, 1875, when Mary J. Robinson, wife of the deceased, died. The bill then alleges, in substance, that during the said marriage of deceased, and in the year 1869 or 1870, the deceased and one Mary J. Dackermann com-

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menced to live together in a state of adultery and concubinage, and so continued till the death of said Dackermann, April 13, 1891; that during the continuance of said illicit relation, and prior to the death of Mary J. Robinson, Mary J. Dackermann gave birth to Martha J. Ruprecht in 1871, and to Curtis E. Robinson, Jr., in 1874, and that during the continuance of said illicit relation and in 1879 said Mary J. Dackermann gave birth to Bessie L. Robinson, and that said children, so born, were not born in lawful wedlock, and are not heirs of Curtis E. Robinson, deceased. The bill, after certain averments in respect to the property involved, not necessary to be mentioned, avers that complainants are desirous of a partition of the premises, sets forth certain interrogatories to be answered by the defendants, except Nathan S. Robinson, on oath, and prays that complainants may be decreed to be the lawful heirs of Curtis E. Robinson, and for partition among them of the premises. The defendants answered the bill, the answers, except that of Nathan S. Robinson, being on oath. April 16, 1896, Curtis E. Robinson, Jr., and Martha J. Ruprecht, individually and as guardian of the person and estate of Bessie L. Robinson, a minor, filed a cross-bill, making the complainants in the original bill and Nathan S. Robinson defendants. The defendants to the cross-bill answered it, replications were filed, and, July 14, 1899, a decree was rendered on the pleadings and on proofs taken and evidence heard in open court, dismissing the original bill and adjudging that Martha J. Ruprecht, formerly Martha J. Robinson, Bessie L. Howison, formerly Bessie L. Robinson, and Curtis E. Robinson, Jr., are the next of kin and only heirs at law of Curtis E. Robinson, deceased. On appeal by the complainants in the original bill the decree was affirmed (Robinson v. Ruprecht, 191 Ill. 424), and the order of affirmance was filed in the Circuit Court November 8, 1901. February 27, 1904, Bessie L. Howison, formerly Bessie L. Robinson, without leave of the court, filed a cross-bill in the cause, making William J. Ruprecht, Martha J. Ruprecht, Frank H. Ruprecht and others, some of which were complainants

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in the original bill, defendants, in and by which cross-bill it was averred, in substance, that Martha J. Ruprecht had collected all of the rents of the property left by the father and had never accounted to appellant for her share of said rents; that said Martha J. Ruprecht had made a fraudulent conveyance of all her property to Frank H. Ruprecht, her brother-in-law; that said deed was without consideration and made for the sole purpose of enabling said Frank H. Ruprecht to hold the title to said real estate for the said Martha J. Ruprecht, and for the purpose of defrauding appellant and hindering and delaying appellant in the collection of her share of the rents collected by said Martha J. Ruprecht, and that by such conveyance said Martha J. Ruprecht was reduced to a state of insolvency, and that nothing could be collected from her, and that the said deed to said Frank H. Ruprecht was fraudulent and void and vested in him no title in and to the property covered thereby and that he took and accepted said deed without paying anything therefor, with full knowledge of and subject to all the rights and claims of appellant and with full knowledge of the existence of such claims against said Martha J. Ruprecht and her interest in and to and against said property, and prayed for an account of such rents so collected by said Martha J. Ruprecht, and that whatever was found to be due appellant should be decreed to be a lien upon the interest of said Martha J. Ruprecht and said Frank H. Ruprecht in said real estate. Upon this cross-bill summons was issued and served upon said Frank H. Ruprecht, who entered his appearance to the same on the 22nd of March, 1904, and on the same day filed a motion to strike said cross-bill from the files. The court sustained this motion and struck the cross-bill from the files, from which order striking the cross-bill from the files this appeal is taken.

M. L. RAFTREE, for appellant.

IVES, MASON & WYMAN, for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

Appellant's counsel contend that the cross-bill of appellant was filed in apt time, that the court had jurisdiction to entertain and pass on it, and, consequently, that the striking it from the files was error.

The decree of the Circuit Court, July 14, 1899, which was affirmed by the Supreme Court in June, 1901, disposed of all issues made in the cause at the time of the entry of that decree. The cross-bill of appellant was filed February 27, 1904, nearly five years after the entry of the decree. In *Beauchamp v. Putnam*, 34 Ill. 381, the defendant, at the hearing, asked leave to file a cross-bill, which was refused. The court say: "A defendant desiring to file a cross-bill should do so without delay, and have the same at issue, if practicable, so as to be heard with the original bill. If he desires any further time, he must seek it as a matter of indulgence. The court is not required, at the hearing of the original cause, to order the defendants to a cross-bill to plead, answer or demur *instantly*. It may give time for answering, and postpone the hearing until the answer comes in; or it may give time, and proceed with the hearing. The complainant in the cross-cause must have it ready to be heard when the original cause comes on for a hearing, or procure a stay of proceedings, if he desires that the two causes shall be heard together."

In *Fread v. Fread*, 165 Ill. 228, after hearing and decree, the defendant petitioned the court for leave to file a cross-bill, and the court denied the petition; notwithstanding which she subsequently filed a cross-bill, which the court, on motion, struck from the files. The court say: "The filing of a cross-bill is a matter of right and requires no leave of court, but it should be filed in proper time. (1. *Starr & Curtis' Stat.*, p. 407, sec. 30; *Beauchamp v. Putnam*, *supra*; *Davis v. American and Foreign Christian Union*, 100 Ill. 313; 3 *Daniell's Ch. Pr.* sec. 1745; *Story's Eq. Pl.* sec. 395. See also, 5 *Ency. of Pl. & Pr.* 653, and collection of cases there noted.) And it does not follow that because a defendant to a bill has the right to file a cross-bill he may do so after hearing and decree, and thus call in

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question matters which, but for such cross-bill, would be concluded by such decree."

In *Bronson v. LaCrosse & M. R'd Co.*, 2 Black (U. S.), 524-532, the court, Mr. Justice Davis delivering the opinion, say: "It is proper to say, that we do not approve of the practice of filing a cross-bill after the original suit has been heard and its merits passed on. If any of the defendants in the suit wished to have the equities between themselves settled without instituting an original suit for that purpose, they should have applied to the court at an earlier stage of the litigation, and not waited until the pleadings were perfected, proofs taken and the cause, after two years of delay, ready for hearing." There are other cases to the same effect. The cases cited are such that the court had jurisdiction and control of the cause when the question arose as to the right to file a cross-bill; but the court, in this case, had no jurisdiction of the original cause of *Robinson et al. v. Ruprecht et al.*, in which appellant's cross-bill was filed after the end of the term at which the decree was rendered. But appellant's counsel contend that the court having appointed a receiver, and the receiver not having been discharged, the court had jurisdiction to allow the cross-bill to be filed. The record before us is certified to be *per prae-cipe*, and it contains no order appointing a receiver. The record, however, contains numerous orders in respect to a receiver's actings and doings, and approvals of his reports, of dates subsequent to July 14, 1899, when the decree was entered, and, in considering appellant's contention, we will assume that a receiver was regularly appointed. In *High on Receivers*, 3rd ed., sec. 833, the author says: "The functions of a receiver usually terminate with the termination of the litigation in which he was appointed. And when the bill upon which the appointment was made is afterward dismissed upon demurrer, the duties of the receiver cease as between the parties to the action. So when defendant in the action in which the receiver was appointed finally obtains judgment therein in his favor, the entry of judgment would seem to have the effect of terminating the re-

ceiver's functions, although plaintiff in the action perfects his appeal to an appellate court. It is to be observed, however, that the abatement of the action, or the entry of final judgment therein, does not have the effect of discharging the receiver *ipso facto*. And although as between the parties to the litigation his functions have terminated with the determination of the suit, he is still amenable to the court as its officer until he has complied with its directions as to the disposal of the funds which he has received during the course of his receivership."

In *Field v. Jones*, 11 Ga., 415, the court say: "The bill, by virtue of which Mr. Schley was appointed receiver and came into the possession of this fund, was dismissed upon demurrer—the legal consequence of which was to dispense with the functions of the receiver as a depository of the parties litigant. His duties ceased with the termination of the litigation between the parties to the bill, and that ceased when it went out of court upon the demurrer. But his relations to the court of chancery from which he received his appointment did not determine—his amenability to that court as receiver continued. That is to say, he was still an officer of the court. His possession of the fund was the possession of the court. Both he and it were subject to the order of the court." To the same effect is *Hickox v. Holladay*, 12 Sawyer's U. S. C't R. 204, 217.

The court, after the dismissal of the original bill, and after the term at which the final decree was entered had expired, had no jurisdiction to entertain a cross-bill and rule the original complainants, defendants to the cross-bill, to answer it. In the present case the appellant caused a summons to be issued for and served on Frank H. Ruprecht, a defendant to the cross-bill, who was not before the court as a party to the original bill or original cross-bill, assuming that such original parties were still in court, as, clearly, they were not. The original bill had been dismissed nearly five years before the cross-bill was filed; the complainants had taken their departure from the forum, and the court had no more jurisdiction over them than had they never

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been before it, except, perhaps, to enforce an injunction against them contained in the decree. Also, the rights of appellant, in issue by the prior pleadings, had been fully settled by the decree. Even if the term at which the decree was rendered had not ended, and the court had had jurisdiction of the persons of the litigants and of the subject-matter of the litigation, appellant could not have filed a cross-bill without leave of the court. *Roberts v. Peavey*, 9 Foster (29 N. H.), 393; *Montgomery v. Olwell*, 1 Tenn. Ch. 169.

A cross-bill will not be permitted to be filed when there has been unreasonable delay. *Baker v. Oil Tract Co.*, 7 W. Va. 454.

In *Roberts v. Peavey*, *supra*, the defendant, after the cause had been decided, moved for leave to file a cross-bill. The court denied the motion, saying: "We have carefully examined the books within our reach, and the result to which we have arrived is, that it is too late to file such a cross-bill after a hearing, unless in those cases where the court finds itself unable to make a satisfactory decree without further facts than those which the parties have laid before them, when they may direct a cross-bill to be filed. The present is not a case of that kind."

We have examined the cases cited by appellees' counsel, and do not consider them applicable in this case.

A motion by appellees to affirm the order appealed from, because of insufficiency of the transcript, was reserved till the hearing, which, by reason of our conclusion, it is unnecessary to pass on.

The order striking appellant's cross-bill from the files will be affirmed.

Affirmed.

George E. Krieger v. Emily Bert Krieger.

Gen. No. 11,958.

1. **MOTION TO VACATE**—*when, should not be granted.* A motion to vacate, made after the lapse of the decree term, should only be granted if the orders sought to be set aside were void for want of jurisdiction.

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2. ORDERS—*when, not void for want of jurisdiction.* Where a court having jurisdiction of the parties and of the subject-matter, erroneously reinstates a cause, orders subsequently entered in such cause are not void but merely erroneous.

Divorce proceeding. Appeal from the Circuit Court of Cook County; the Hon. FREDERICK A. SMITH, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed May 29, 1905.

RUBENS, FISCHER, MOSSEY & RIGBY, for appellant.

CHARLES C. GILBERT, for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

This appeal was consolidated for hearing with Krieger v. Krieger, error to the Circuit Court, general number 11907, and both cases were heard on the same record. The appeal is from an order of the court denying appellant's motion, made June 28, 1904, to vacate and set aside a decree entered in the cause May 4, 1904, and also to vacate and set aside an order entered in the cause July 18, 1903, and all other orders entered in said cause subsequent to June 26, 1903, on the ground that the court had no jurisdiction to enter said decree and orders.

We have held in *George E. Krieger v. Emily Bert Krieger*, 120 Ill. App., that the order of July 18, 1903, vacating and setting aside the order of June 26, 1903, and reinstating the cause, was erroneous, and that all orders in the cause subsequent to June 26, 1903, except the order of August 23, 1904, and the order allowing this appeal, were erroneous, to the opinion in which case reference is made. The order of July 18, 1903, was entered at the June term 1903, and the decree of May 4, 1904, was entered at the April term 1904, which term expired May 15, 1904, and appellant's motion was made June 28, 1904, which was a day of the June term 1904. Thus the motion was made about a year after the order of July 18, 1903, was entered, and at the second term after the decree of May 4, 1904, was entered, and could only be granted if the decree and orders were void for want of jurisdiction.

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In our opinion in *Krieger v. Krieger*, *supra*, in error, we did not hold that orders made in the cause, after June 26, 1903, were void for want of jurisdiction, but merely that they were erroneous. The court when, July 18, 1903, appellee moved to set aside the order of June 26, 1903, dismissing the cause, had jurisdiction of the parties and the subject-matter. It had the right to hear and decide the motion, and, because the court erred in allowing the motion and reinstating the cause, we do not think it follows that all the subsequent orders were void for want of jurisdiction, although erroneous. Our view being that the orders and decree in respect to which the motion was made were not void for want of jurisdiction, the order denying appellant's motion must be affirmed.

Affirmed.

Jewell Belting Company v. Hamilton Rubber Manufacturing Company.

Gen. No. 11,970.

1. **CONTRACT**—*when action for breach of, lies, notwithstanding stipulation that defective merchandise will be replaced.* A contract which provides that defective merchandise will be replaced without expense to the purchaser does not require the purchaser to do more than notify the seller that the merchandise will not be accepted, and does not preclude the right of the purchaser to maintain an action for damages for the breach of such contract.

2. **CONTRACT**—*erroneous construction of, ground for reversal.* In an action at law an erroneous construction of a contract with respect to a material matter, is ground for reversal.

3. **EVIDENCE**—*when, as to cause of defect in merchandise, competent.* It is competent for a witness to testify that the crookedness of belting constituted a defect therein and to give the cause of such crookedness, notwithstanding he may not have seen the belting in question.

4. **GENERAL OBJECTION**—*what not reached by.* A general objection does not reach any impropriety in the form of the question objected to.

Action of assumpsit. Appeal from the Superior Court of Cook

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County; the Hon. JESSE HOLDOM, Judge, presiding. Heard in this court at the October term, 1904. Reversed and remanded. Opinion filed May 29, 1905.

Statement by the Court. Both the parties to this appeal are corporations. The appellant sued appellee in assumpsit. The declaration contains two counts and is as follows:

"Jewell Belting Company, a corporation, plaintiff, by Rogers & Mahoney, its attorneys, complains of Hamilton Rubber Company, a corporation, in a plea of trespass on the case on promises.

For that whereas heretofore, to-wit: on the 24th day of February, A. D. 1900, at Trenton, in the State of New Jersey, to-wit: Chicago, in the State of Illinois, the defendant entered into a certain contract with the plaintiff as follows, to-wit:

"Feb. 24, 1900.

Hamilton Rubber Co., Trenton, N. J.

Gentlemen: Your several letters, telegrams and samples covering the question of 5" 4-ply belting has been received and we have decided to place our order with you on the following conditions, which are practically the concentration of what you have already proposed to do.

We refer to the samples you have submitted, as follows:

The first or long sample which you sent to your Mr. Best, we called No. 1, and the second or short sample which you sent to us direct and which was received to-day, we refer to as No. 2.

FRICTION. The friction in the belt that you are to furnish, is to be in every respect equal to the friction in sample No. 2, both as to quantity and quality, and you will agree that this friction will not dry out or materially deteriorate during the ordinary life of the belt.

DUCK. The duck to be used in the belt is to be strictly thirty ounce 'Mt. Vernon' Cover. The cover on the belt shall be equal in every respect to the cover on your sample No. 2, but is to be of the same thickness as the cover on sample No. 1.

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GUARANTEE. All belting furnished under our order is to be guaranteed to be perfect in material and in manufacture, and should it prove otherwise, it will be replaced by you without any expense to us.

FINISH. The finish of the belting we want light in color and as smooth as it is possible for you to make it. The finish of sample No. 1 which you submitted is satisfactory.

TERMS. Price of belt to be 75-5 per cent from list. Terms on our order to be four months net or 3 per cent thirty days from date of invoice; goods to be delivered.

PACKAGE. There are to be no marks on the belt itself, each roll to be burlaped separately and to contain stenciled marks on the outside showing length, width and ply and no other marks whatever.

Bill of lading to accompany each shipment and each invoice.

We shall retain in this case, both your samples No. 1 and No. 2, which have been carefully and properly marked upon which the goods you furnished on this order will be compared.

Under the above conditions, and with a clear understanding upon your part of what our requirements are, we place this order and we have no doubt from what you have written, both to us and to your Mr. Bast, who has had the kindness to show us one or two of your communications, but what the belt will be satisfactory.

Of course we are depending upon it being so.

We are pleased to place the order with you and we trust there will be no regrets either upon your part or our own.

Yours very truly,

JEWELL BELTING Co.,

Fred'k G. Davis, Mgr.'

In consideration that the said plaintiff at the special instance and request of the said defendant would buy of the said defendant certain goods, wares and merchandise called belting at and for the price therein mentioned to be paid by the plaintiff, wherein it, the defendant, undertook and

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then and there faithfully promised the said plaintiff that all the goods, wares and merchandise called belting, so to be ordered and delivered under said contract would be of the kind and quality therein specified.

And the said plaintiff avers that it, confiding and relying upon the terms and conditions of said contract and undertaking of the said defendant, did afterwards at Trenton, in the State of New Jersey, to-wit: Chicago, in the State of Illinois, order of the defendant a large quantity of merchandise called belting and then and thereafter paid the defendant the said prices and sums mentioned in said contract for said goods; nevertheless the said defendant not regarding its promises and undertakings in said contract by it made on the contrary thereof the goods and merchandise called belting so delivered to the plaintiff under said contract was not of kind, quality or manufacture according to the terms and conditions of said contract and said goods were of no value to the plaintiff.

And whereas also afterwards, to-wit: on the day and year aforesaid, at Trenton, in the State of New Jersey, to-wit: at Chicago, in the State of Illinois, aforesaid, in consideration that the said plaintiff at the special instance and request of said defendant, had then and there bought of the defendant certain merchandise called belting to be manufactured by the defendant at and for a price or sum of money then agreed upon between the plaintiff and defendant, it, the said defendant, undertook and then and there faithfully promised the said plaintiff that the said last mentioned merchandise called belting should be sound and merchantable belting at the time of the sale and delivery of said belting, nevertheless the said defendant contriving and intending to injure the said plaintiff, did not regard its last mentioned promise and undertaking, but thereby deceived and defrauded the plaintiff of this, to-wit: that the said merchandise called belting at the time of the sale and delivery thereof, was not sound and merchantable belting, whereby the said last mentioned belting was of no value to the plaintiff, and the plain-

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tiff avers that it paid for all of the belting sold and delivered to it.

To the damage to the plaintiff of \$5,000, and therefore it brings suit."

The defendant pleaded the general issue and a set-off. A jury was empaneled and sworn to try the issues, but, after the trial had somewhat progressed, a juror was withdrawn by agreement of the parties, and the cause was submitted to the court for trial. The court found the issues for appellee, and assessed appellee's damages at the sum of \$2,500, and rendered judgment on the finding. The contract relied on by appellant is evidenced by appellant's letter of February 24, 1900, set out at large in the declaration, and the following letter from appellee to appellant:

"Trenton, N. J., Feb. 27, 1900.

Jewell Belting Co., Chicago, Ill.

Gentlemen: We have your esteemed favor of the 24th inst., together with your order for belts. About the time your letter reached us Mr. Blodgett was due in Chicago, and we at once telegraphed him that we had received your order. We made up yesterday a sample roll of belting, which we sent last night by express.

In view of the possibility of a misunderstanding between us, we think it better to submit a sample roll made in a practical way rather than to depend on samples; which, though they were furnished of precisely the same stock as the roll which we sent you, and the same as we shall use in making up your order, the appearance of the sample does not always indicate precisely what the belt may be made up in the regular way; because it is not cured in the same press at the same pressure, and we do not have the chance to stretch it; hence our reason for delaying you long enough to see the sample roll, and not going ahead with the 20 rolls, which may not be exactly what you want. Nevertheless we believe we shall be able to please you in the matter of the execution of this order, and shall do our very best to do so.

We thank you for the order and for the confidence you

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have placed in us in this matter, which we shall always endeavor to merit.

HAMILTON RUBBER MFG. CO."

March 1, 1900, appellant wrote to appellee the following letter:

"March 1st, 1900.

Hamilton Rubber Co., Trenton, N. J.

Gentlemen: Your letter of the 27th ult. received. Also sample roll 5" 4-ply belting. We think that our letter of the 24th ult. to you on the subject of this belting is altogether explicit enough so as to warrant our expecting no deviation from the conditions under which the order was placed, and considering also the understanding the writer has had with your Mr. Blodgett as supplementary to the letter itself.

We believe that he personally understands what our requirements are and what will be expected.

JEWELL BELTING CO."

ROGERS & MAHONEY, and CHILTON P. WILSON, for appellant.

RITTSHER, MONTGOMERY & HART, for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

Neither party contends that there was not an acceptance by appellee of appellant's proposition contained in its letter of February 24, 1900, and the goods in question were delivered by appellee to appellant after the letter of March 1, 1900, from appellant to appellee was written. The letters of February 24th and 27th were put in evidence, and the contract evidenced by them is clearly, as we think, that appellee would sell the 5-inch belting, which is the only belting mentioned in the letter of February 24th, to appellant, on its orders, according to the samples mentioned in appellant's letter of February 24, 1900, the belting, if not corresponding with the samples, to be replaced by appellee without expense to appellant. Appellant introduced no evidence of any claimed defect in the 5-inch belting, except that it was crooked, as compared with the samples, which the evidence tends to prove were straight.

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The clause in the proposal of February 24, 1900, entitled "Guarantee" is: "All belting furnished under our order is to be guaranteed to be perfect in material and manufacture, and should it prove otherwise, it will be replaced."

Frederick G. Davis, appellant's manager, testified that he had, prior to 1900, twenty-one years experience in buying and selling rubber belting of the style of belting in dispute; that he had seen the samples furnished by appellee and had compared them with the belting shipped by appellee to appellant, and the samples, including the sample roll mentioned in appellee's letter of February 27, were straight, and that the belting was crooked; that Mr. Bast, appellee's manager, was present when witness examined the belting, and witness told him that the Case Company refused to put the belting out in that condition, and that Bast said to go ahead and put it out and that appellee would stand back of us. Also, that Bast examined one or more rolls of between 300 and 400 feet, and recognized that the belting was crooked, but said he did not believe that it was so crooked as to injure the running of it, and for us to go ahead and put it out. On another occasion Bast said that the belting had commenced to go wrong. The witness further testified that he examined a dozen rolls of the 5-inch belting.

Fred J. Rathbun testified that he examined seven or eight rolls of the 5-inch belting, containing 380 to 400 feet each, taken from different shipments, and that it was crooked, and when laid out on the floor it lay on a curve. Mr. Servis, appellee's vice-president, testified that the belting was all manufactured in precisely the same way.

Appellant is a jobber in rubber belting, and in compliance with the request of appellee, by its general manager, Mr. Bast, it put the 5-inch belting on the market, selling the most of it to the I. J. Case Threshing Machine Company, of Racine, Wisconsin. That Mr. Bast directed appellant to put the belting out and said appellee would stand back of it, is not contradicted by the evidence, and the legal effect of this is that appellee is estopped to claim an absolute acceptance by appellant of the belting. Appellee, by requesting ap-

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pellant to put out the belting, in other words, to dispose of it in the market, waived its privilege of replacing objectionable belting, and left appellant free to pursue its legal remedy, precisely as if the contract contained no provision for replacing belting.

Mr. Davis, after testifying as stated, was asked: "Mr. Davis, what would such belting as you examined be worth on the market, at that time?" An objection was sustained to the question, after which the following question was asked the witness: "Mr. Davis, what would such belting as this 5 by 4 belting be worth in the Chicago market in 1900, in the condition in which you found it, when you examined these different rolls?" A general objection was made to each of the questions, when the court said: "I am sustaining the objection to these different questions on the ground that you have got to return them, according to contract, and give them an opportunity to replace them. If you lost the sale of belting by reason of its not being up to grade, then you would have an action on that, but you must follow the contract. They might find a better market than you could. You must live up to the contract; that is what a contract is for. You cannot go your own way." The court persisting in its ruling, the following occurred:

"Mr. Wilson: If your Honor is going to hold that these goods should be returned even under the contract, I would suggest that we simply withdraw a juror and submit it to the court.

Juror withdrawn, according to agreement.

Mr. Wilson: As I understand it, the difference between your Honor and myself was upon the question as to whether or not these goods should be returned.

The Court: Whether or not the contract should be complied with.

Mr. Wilson: Well, in that respect.

The Court: In that regard, yes. Suppose we proceed. I am against you on that proposition.

Mr. Wilson: All right, I will take an exception."

It having been admitted that the belting in question was

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not returned, the ruling of the court necessarily excluded all evidence on the part of appellant tending to prove damages, to recover which was the object of the suit, and appellant would have saved time by resting after it had reserved an exception to the ruling.

We think the court erred in its construction of the contract. The contract provides that the belting "is to be guaranteed to be perfect in material and manufacture, and should it prove otherwise, it will be replaced by you, without any expense to us." This, certainly, did not require appellant to return belting which did not conform to the contract. The appellee, under such circumstances, contracted to substitute other belting, without expense to appellant, and appellant could not return the belting to Trenton, New Jersey, without expense. The utmost that can be said in respect to appellant's duty in the premises is, that it was incumbent on it to notify the appellee that the belting was inferior to that contracted for, and would not be accepted.

Grimoldby v. Wells, L. R. 10 Com. Pleas, 391, decided in 1875, is directly in point on the general question, whether when one sells goods by sample, and the goods, when delivered and inspected, are found not equal to the sample, it is incumbent on the vendee to return the goods. It was contended that such was the vendee's duty, in respect to which Lord Coleridge, C. J., says: "There is no want of authority to the contrary of the proposition contended for. In the case of *Lucy v. Mouflet* (1), both *Martin, B.*, and *Bramwell, B.*, expressly lay it down that it is not necessary to send back the goods in order to entitle the purchaser to reject them. It would be very hard if it were so. By the supposition the vendor has not complied with the contract, and has sent goods which as against the purchaser he had no right to send; why should he be entitled to impose upon the purchaser, who never bargained for such goods, and who has a right to reject them, the burden of sending them back, possibly for a considerable distance, at a considerable expense? No authority, as it seems to me, can be cited for such a proposition, and the reason and justice of the thing

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are against it. For these reasons it appears to me that the county court judge was wrong, and his judgment must be reversed." In the same case Brett, J., says: "The defendant has a right to inspect the goods, and it seems to me that where the sale is by sample, and inspection is to be at some place after delivery, the true proposition is, that if the purchaser on such inspection finds the goods are not equal to sample, or if they are, in fact, not equal to sample, he has a right to reject them then and there, and is not bound to do more than reject them. There are several modes in which he may reject them, some of which are pointed out by Lord Chelmsford in *Couston v. Chapman* (1), in the passage which was cited from his judgment, and which, in my opinion, is to be read not as if cumulative, but as if alternative. He may, in fact, return them, or offer to return them; but it is sufficient, I think, and the more usual course is, to signify his rejection of them by stating that the goods are not according to contract and they are at the vendor's risk. No particular form is essential; it is sufficient if he does any unequivocal act showing that he rejects them." See, also, *Underwood v. Wolf*, 131 Ill. 425, 435-438, and cases there cited. The last case is cited with approval in *Wheelock v. Berkeley*, 138 Ill. 153, 157, and in *Morris v. Wibaux*, 159 Ill. 627, 643. So much with regard to the general question, when the contract is silent as to return. In the present case the language of the contract is, of itself, a sufficient answer to the proposition that it was appellant's duty to return the belting. The objection to the questions above quoted, put to the witness Davis, were general, specifying no ground of objection, and the sustaining of the objections was error.

Don C. Blanchard, after testifying that he was a manufacturer of rubber belting and had been for seventeen years, was asked these questions:

Q. "Mr. Blanchard, suppose that rubber belting, say of 5-inch wide and 4 ply, when rolled out on the floor, was crooked belting, as a rubber manufacturer what would you say caused that defect?"

Q. "Supposing, Mr. Blanchard, that rubber belting that

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was 5 inches wide and 4 ply, when rolled out on the floor, was crooked, would or would you not say that was a defect in the belting?"

The court sustained general objections to these questions, saying: "You cannot prove that by this witness, because he never saw the belting." Mr. Davis had testified that the samples were straight and the belting crooked, and it was not necessary that the witness Blanchard should, himself, have seen the belting, in order to testify as to the cause of the crookedness, and whether the crookedness was a defect. The first question is, perhaps, obnoxious to criticism in assuming that crookedness in belting is a defect, but this could not be reached by general objection. We are not called upon to pass on the form of any question mentioned in this opinion. Appellant's attorney offered to prove by the witness that the crookedness of the belting was caused in the manufacturing of it, to which offer an objection was sustained. We think the refusal to admit the evidence was error.

Appellant put in evidence the following letter:

"Chicago, Ill., Feb. 21, 1901.

Hamilton Rubber Co., Trenton, N. J.

Gentlemen: As a means of reducing to writing the understanding had between your Mr. Blodgett and our Mr. Davis with regard to the 5-inch 4-ply rubber belting furnished last year on our orders for the J. I. Case Threshing Machine Co., and upon which there has been claims made by the said J. I. Case T. M. Co. upon us for allowances, not as yet specified, by reason of the belts being, in their estimation, defective in sundry particulars.

With a view to our being able to settle the matter and pay to you such invoices as may be purchased from you from time to time and owing to our desire to continue our relations in a most harmonious way, it is agreed between us, that we pay you your account in full, as it stands upon our books on this date, reserving, however, the sum of \$2,500, which sum shall be considered bearing directly upon the settlement of the J. I. Case Threshing Machine Co. account,

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it being understood, however, that we shall use our utmost endeavors to settle with the J. I. Case T. M. Co. to the very best of our ability in your interest, and when such settlement is arrived at we will make a detailed report to you of such settlement and the conditions concerning it, and at that time we will take up further the allowance that you shall make on such belting.

It is understood further that in this settlement with the J. I. Case Co. we shall endeavor to have returned all belting in their hands of your make, as we shall endeavor to have returned all other goods which we furnished them and which they may have on hand at the time of settlement.

Every feature of the transaction in all its details has been gone over between Mr. Davis and Mr. Blodgett, and we shall take pleasure in advising you of any future developments pertaining to this particular transaction.

We will endeavor to make the earliest possible settlement of this claim, with a view to closing our books at the earliest date possible on the balance above referred to.

Very truly yours,

JEWELL BELTING Co.,

By Frederick G. Davis.

Accepted.

HAMILTON RUBBER Co.,

By....."

The evidence is that the most of the belting in question was shipped by appellant to the J. I. Case Threshing Machine Company, of Racine, Wisconsin.

Inasmuch as there seems to be some difference between counsel as to the effect of the agreement of February 21, we think it proper to state our views in respect to it.

It is impliedly admitted by the agreement that \$2,500 of the purchase price of the belting had not been paid by appellant, and it was agreed that appellant would reserve that amount, pending which reservation it was to use its utmost endeavors to settle with the Case Company, and, if it should succeed in making a settlement with that company, it was

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to report to appellee, and then the parties were to take up the question of what allowance appellee should make to appellant. There is no provision in the agreement as to what should be done in the event that appellant should not succeed in its efforts to procure a settlement; but both parties evidently acted upon the hypothesis that a settlement between appellant and the Case Company might be made, and we do not think the agreement can be understood as meaning that, if such settlement should be found impossible, appellant would be bound to abandon its claim for damages. The agreement is, in effect, that negotiations between the parties should be suspended pending appellant's efforts to settle with the Case Company. The evidence is that the appellant found it impossible to settle with that company; that the company not only refused to settle, but threatened to sue appellant. After it was demonstrated that no settlement could be made with the Case Company, appellant could rightfully sue for the damages which it claimed, or appellee for the unpaid balance of the purchase price of the belting. Practically, both parties have so construed the agreement—appellant, by suing for damages, and appellee by pleading a set-off, which is a cross action, for the unpaid balance of the price of the belting.

There is a conflict in the evidence as to whether appellee furnished to appellant any samples of the one and one-half and two-inch belting, and a conflict between counsel as to whether appellant did or not abandon its claim for damages in respect to that belting. These are questions which, on account of the conclusion we have reached, we do not deem it expedient to discuss. The fact that the court construed the contract between the parties erroneously, to appellant's prejudice, is, of itself, reversible error. *Iroquois Furnace Co. v. Wilkin Man'g Co.*, 181 Ill. 582, 596; *Bright v. Kenefick*, 69 Ill. App. 43.

The judgment will be reversed and the cause remanded.

Reversed and remanded.

McCormick Harvesting Machine Company v. Frank Zakzewski.

Gen. No. 11,978.

1. **ASSUMED RISK**—*what not*. The risk of the possible falling of a pile of lumber is not one of the usual and ordinary risks incident to the employment of one engaged at work in a lumber yard.

2. **SERVANT**—*right to assume place of employment safe*. A servant has a right to assume, unless the contrary is obvious, that the place in which he is directed to work is reasonably safe.

3. **NEGLIGENCE**—*when presumption of, arises*. Where a pile of lumber falls without its having been touched by any one, a presumption of negligence arises in favor of a servant against his master.

4. **MASTER**—*cannot delegate primary duties*. The master cannot shirk or shift to another the duty of furnishing to his servant a reasonably safe place to work; he cannot devolve that duty upon a fellow-servant of the injured servant so as to avoid responsibility for his failure to perform his duty.

5. **RELEASE**—*when question as to whether, fraudulently obtained, should be sent to jury*. It is proper to submit to the jury, to determine as a question of fact, whether a release, averred as a bar to the action, was obtained by fraud and misrepresentation, where the evidence with respect to such matters is conflicting.

Action on the case for personal injuries. Appeal from the Superior Court of Cook County; the Hon. WILLARD McEWEN, Judge, presiding. Heard in this court at the October term, 1904. **Affirmed.** Opinion filed May 29, 1905.

Statement by the Court. Appellee sued appellant in case, for personal injuries, and recovered judgment for \$1,350. The declaration contains four counts. Appellant pleaded the general issue. The accident causing the injury of which the plaintiff (appellee here) complains occurred about two o'clock in the afternoon of February 20, 1901, in the defendant's lumber yard. Plaintiff was then about fifty years of age. There were two piles of lumber in the yard, which were being transferred to trucks, at the time of the accident. These piles had been constructed under the orders of Herman Krempski, appellant's foreman. The piles lay north and south, lengthwise the lumber. The evidence of the plaintiff's witnesses varies as to the width of

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the space between the piles, from 1 to 2½ inches. The evidence tends to prove that the lumber in the east pile was 3¼ by 4½ inches and 14 feet long, and that in the west pile 4 by 4 inches and 13 feet long, and that the lumber in the piles was green, or partly so, and heavy, and was icy and slippery, and that the piles were each from 3 to 4 feet in width and about 7 feet high; also that there were no cross-pieces in the piles, and that it was the defendant's custom to put cross-pieces in piles 7 feet or more in height. The evidence is uncontradicted that neither the plaintiff, nor Jerosal, who was working with plaintiff at the time of the accident, constructed the piles, but that they were constructed by Krempski's direction, by other employees of the defendant about an hour before the accident. Plaintiff's evidence is that Krempski told the plaintiff, Jerosal and one Smith to go to work removing the east pile, which they did, plaintiff and Jerosal removing the lumber from the pile and Smith placing it on a truck, which was on a track on the north side of and close to the pile. Plaintiff and Jerosal got on top of the east pile to remove the lumber from it, the pile being too high for them to reach and remove it, standing on the ground, and when they had removed about four feet from the pile, the remainder of it being then about three feet high from the ground, they got down on the ground and were taking the lumber from the remainder of the pile, when the west pile fell eastward on appellee and broke his right leg a few inches above the ankle. The uncontradicted evidence is that neither appellee nor Jerosal touched the west pile.

W. T. UNDERWOOD, for appellant.

GEORGE F. BARRETT, for appellee; CHARLES V. BARRETT, of counsel.

MR. JUSTICE ADAMS delivered the opinion of the court.

Appellant's contentions are as follows, and will be considered in the order stated:

1. That appellee assumed the risk of the east pile falling.

It cannot be reasonably contended that the risk of a pile of lumber, 7 feet in height and from 3 to 4 feet in width, falling, was one of the usual and ordinary risks incidental to plaintiff's employment, or which, in view of the evidence, was open and obvious to him. An employee or servant does not assume a risk which is owing to the master's negligence in not furnishing him with a reasonably safe place in which to work.

In Consolidated Coal Co. v. Haenni, 146 Ill. 614, 623, the court say: "When the master fails to furnish suitable machinery and to see that it is properly protected, or to employ careful and prudent persons to manage and operate such machinery, the risks resulting from such failure are extra hazardous, and such extra hazards are not among the risks, which the employee assumes, as a part of his contract of service."

The duty of the master to furnish his servant with a reasonably safe place in which to work is a personal duty, and cannot be shifted to another, so as to relieve the master of responsibility for failure to perform that duty. Libby, McNeill & Libby v. Scherman, 146 Ill. 541; C. & A. R. R. Co. v. Scanlan, 170 Ill. 106, 114; Ill. Steel Co. v. Schymanowski, 162 ib. 447; Whitney v. O'Rourke, 172 ib. 177.

The servant has the right to assume, unless the contrary is obvious, that the place in which he is directed to work is reasonably safe. In Ill. Steel Co. v. Schymanowski, *supra*, the court say, p. 459: "When the master orders the servant to perform his work, the latter has a right to assume that the former, with his superior knowledge of the facts, would not expose him to unnecessary peril. The servant has a right to rest upon the assurance that there is no danger which is implied by such an order." See, also, Offutt v. Columbian Exposition, 175 Ill. 472. In the present case, the order to work on the east pile was given by Krempski, appellant's foreman and its direct representative, and was, in law, appellant's order. Ill. Steel Co. case, *supra*, p. 456.

But appellant's counsel contend that appellee was familiar with the manner of piling, saw the pile which fell, and, by

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the exercise of ordinary care, might have known of its condition. This contention has no basis in the evidence. The uncontradicted evidence is that the west pile was straight and looked all right, except that one witness states that it was too high and too narrow. Even appellant's counsel says of the piles, in his argument: "They were straight; they looked all right, and there was nothing to indicate any act of negligence or carelessness on the part of appellant, or any of its employees, in the making of these particular stacks." The defect, therefore, which caused the west stack to fall was latent, and could not have been discovered by appellee prior to the accident. Besides, it was not incumbent on appellee to inspect the west pile. He had a right to assume that the place in which he was ordered to work was reasonably safe, and there was no apparent reason for disobeying the order given him. It was not part of his duty to inspect the conditions, or to do anything except to work as well as he could, under the directions of his foreman. *Ill. Steel Co. v. Schymanowski*, 162 Ill., p. 455.

2. Counsel for appellant contends that the stacks were so close together, viz.: from one inch to two and one-half inches apart, that the two were substantially one stack, so that the west stack could not have fallen, unless by the lowering of the east stack, and cites cases to the effect that the risk necessarily incurred in taking down or erecting a building is assumed by an employee engaged in the work. The statement that the piles were so close together that the taking down of one caused the other to fall, has no support in the evidence, which is, as stated by counsel, that the piles were from one to two and one-half inches apart, which necessarily means that they did not touch or come together anywhere. Appellee and Jerosal, who was working with appellee on the east pile, both testified that, when they were removing the lumber from the east pile they did not touch the west one. Therefore, the cases cited by counsel have no application. It is obvious, we think, that unless the piles were in contact, so that each supported the other, the taking down of one, without touching the other, would not

affect the other. Appellant's counsel, in another place in his argument, says: "There is no evidence in the record whatever as to what caused the west stack to fall."

3. Counsel urge that a servant cannot recover, on the ground that there was a safer way of doing the work (in which we concur), and says, in substance, that if there was any safer way than that used, it does not appear from the evidence, and also says: "There is no evidence to show that the manner of making the stacks was any departure from the usual manner of making stacks in this lumber yard." One of plaintiff's witnesses testified that the west stack was too high and too narrow; another, that cross-pieces were always used in appellant's yard, in case of a pile 7 feet high, and over that height, and 3 or 4 feet in width. This evidence is uncontradicted. It is also in evidence, without contradiction, that there were no cross-pieces in the pile which fell. We are of opinion that the mere falling of the west pile, without its having been touched by any one, is, of itself, evidence of negligence in the construction of the pile. In *Chicago City Ry. Co. v. Barker*, 209 Ill. 322, 326, the court say: "The meaning of the maxim *res ipsa loquitur* is that, while negligence itself is not, as a general rule, to be presumed from the occurrence of the injury, yet the injury itself may afford sufficient *prima facie* evidence of negligence, and the presumption of negligence may be created by the circumstances under which the injury occurred," and the court quote with approval the following from an English case: "There must be reasonable evidence of negligence. But, when the thing is shown to be under the management of the defendant, or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management, use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of proper care."

In *Hartford Deposit Co. v. Sollitt*, 172 Ill. 222, in which the plaintiff was injured by the fall of an elevator, the court say: "The fact of the falling of the elevator is evidence tending to show want of care in its management by the oper-

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ator, or its servants, or that the same was out of repair or faultily constructed." Springer v. Ford, 189 Ill. 430, is to the same effect. McGregor v. Reid, Murdoch & Co., 178 Ill. 464, was case for an injury occasioned to the defendant's servant by the fall of an elevator, and the court say: "Appellee is not liable, however, on the facts proved, as a common carrier of passengers, but, if at all, only for its failure to use that degree of care which the law required that it, as master, should exercise, in providing a safe means of transit for appellant, as its servant, from one to another of the several floors of its building, to and from which it was necessary for him to pass in the performance of his duties," citing McDonough v. Lanpher, 57 N. W. Rep. 152. Here, the appellee was a servant of appellant, and the latter's duty was to furnish to him a reasonably safe place in which to work, and the failure so to do the jury was warranted in finding was negligence.

4. It is contended that the pile was put up by fellow-servants of appellee, and therefore appellant is not liable. It follows from the rule, heretofore stated, viz.: that the master cannot shirk, or shift to another, the duty of furnishing to his servant a reasonably safe place to work; that he cannot devolve that duty on a fellow-servant of the injured servant, so as to avoid responsibility for his failure to perform his duty, and so are the decisions.

In C. & A. R. R. Co. v. Scanlan, 170 Ill. 106, 114, the court uses this language: "But it is said that the carpenters who constructed the scaffold were fellow-servants of the bricklayers. If that were conceded to be true, the fact would not absolve appellant from liability. The duty to use reasonable care for the safety of the structure, upon which appellee was required to work, was one owing directly by appellant to appellee, of which it could not divest itself by any delegation to others, and the rule in that regard is quoted above from the opinion in Hess v. Rosenthal. In such a case the duty rests upon the master, and a negligent performance of it is his negligence, by whomsoever performed,"

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citing numerous cases. To the same effect is Ill. Steel Co. v. Schymanowski, 162 Ill. 447, 456.

5. Counsel urge that the evidence, with all legitimate inferences from it, is insufficient to support the verdict, and that the court should have instructed the jury, on appellant's motion, to find for appellant. Our conclusion from the evidence is, that it fully sustains the verdict.

6 and 7. The sixth and seventh contentions are, in substance, that facts are not averred in the declaration showing any duty incumbent on appellant toward appellee. We have examined the declaration and find it substantially sufficient.

8. The following release, purporting to be executed by appellee, was put in evidence by appellant:

"Know all men by these presents, that I, Frank Zakzewski, alias Novak, of the City of Chicago, County of Cook and State of Illinois, for the valuable consideration of McCormick Company to pay my hospital bill, to me in hand paid by McCormick Harvesting Machine Company of the same place, the receipt whereof is hereby acknowledged, do hereby release and forever discharge the said McCormick Harvesting Machine Company from all claims and demands, and each and every and all right, cause and causes of action, of every name, nature and description whatsoever, which I now have or which has accrued in my favor against it, the said McCormick Harvesting Machine Company, arising or growing out of or by reason of any matter, cause or thing whatsoever, from the beginning of the world to the day of the date hereof.

Witness my hand and seal this 21st day of February, A. D. 1901.

his

FRANK X ZAKZEWSKI. (Seal.)

mark

Witnesses:

Dr. J. C. Hollister,
A. H. Brown."

It was contended by appellee that the execution of the instrument was fraudulently obtained. Anson H. Brown, appellant's claim agent, testified, in substance, that he saw

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appellee at St. Luke's hospital about two o'clock in the afternoon the next day after the accident, and had with him Jacob Jerosal, a Pole, as interpreter in the Polish language, and had a conversation with appellee through said interpreter; that witness had the release in his hand and read from it a few words at a time, and Jerosal interpreted the release to appellee, after which witness asked appellee if he understood the paper, and he said, through the interpreter, that he did. He said he could not write his name, and he signed the paper by making a cross, and Dr. Hollister and I signed it as witnesses. This witness further testified, in substance, that after appellee left the hospital, witness talked with him on two occasions, through interpreters, at appellant's works, and each time appellee asked for \$25, which witness refused, saying that appellee had settled and signed a release, and that, on one of these occasions, appellee said he had signed a release at the hospital, and that he thoroughly understood it when he signed it. On cross-examination witness testified that he asked Jerosal to go with him, as interpreter, but does not know that he told him his ultimate mission when they started, but did tell him on the way to the hospital; that at the hospital witness told Jerosal to interpret the release to appellee, and that Jerosal held the paper in his hand from ten to fifteen minutes; that witness knew what Jerosal said to him, but not what he said to appellee, and Jerosal told witness that appellee understood the paper and was willing to sign it. Witness further testified that after the suit was commenced he told one Belinski to ask appellee if he would sign a stipulation to dismiss his suit for \$50, and that Belinski reported to witness that appellee said he would, but was afraid of his attorney, etc.

Jerosal, the interpreter, testified, in substance, that Brown did not ask him to go to the hospital as an interpreter, that he did not know that he was going to the hospital, but only that they were going to see appellee; that when they arrived where appellee was, in the hospital, appellee was asleep, and witness waked him; that Brown read nothing, but merely told witness to explain to appellee that the McCormicks

wanted to know whether appellee would stay in the hospital, the McCormicks to pay his expenses; that he could stay there till everything was all right and then come back to work, and appellee said: "I don't know; well, I will sign for that expense." Brown did not tell me this was a release for all damages, and to tell appellee he was giving up all claim against the McCormick people. On the release being read to witness, he said that he never heard it before. Witness further testified that Brown did not ask him whether he could read English, and that he, witness, could not read or write English. On cross-examination witness said that he never, before the trial, saw the release, and that it had never been read to him by any one. Jerosal's testimony as to what occurred at the hospital is substantially corroborated by that of appellee. There was some other evidence, but the evidence, as a whole, was conflicting, and it was a fair question for the jury, whose province it is to pass on the credibility of the witnesses, to determine on which side the truth was. *Chicago City Ry. Co. v. McClain*, 211 Ill. 589, 595.

The fact of appellant's unseemly haste, in having its claim agent follow appellee to the hospital, with a release in his pocket prepared for signature, the very next day after the accident, was not likely to induce in the minds of the jury an impression favorable to appellant; nor was the fact that appellant, by its claim agent, undertook to settle the damages for a broken leg for the wholly inadequate sum of \$27, which the evidence shows was the total of the hospital expenses; nor was the fact that appellant's claim agent, as he testified, endeavored to procure the dismissal of the suit for \$50. If appellant had a valid release, as it claims, why did it offer to so induce dismissal of the suit? It is not an unreasonable inference that it doubted the validity of the release.

It is not contended, in appellant's argument, that the sum awarded as damages is excessive.

The judgment will be affirmed.

Affirmed.

**The Concordia Fire Insurance Company v. Thomas
C. Bowen.**

Gen. No. 11,962.

1. **CERTIFICATE OF EVIDENCE**—*when will be deemed to contain all the evidence.* Notwithstanding a certificate of evidence does not specifically certify that it contains all the evidence heard in the cause, yet if such fact clearly appears in some other way, it will be deemed to contain all the evidence heard in the cause.

2. **REBUTTAL**—*when admission of improper, not ground for reversal.* The admission of evidence in rebuttal which should have been offered in chief is not ground for reversal unless it clearly appears that injustice has resulted from the action of the court in permitting such evidence at such time.

3. **INSURANCE POLICY**—*when non-payment of premium does not affect enforceability of.* Where an insurance policy has been delivered and the right of cancellation has not been exercised by the company, the fact that the premium has not been paid will not affect its validity and enforceability.

4. **INSURANCE POLICY**—*failure of the insured to obtain arbitration not condition precedent to recovery.* Failure of the plaintiff to obtain or to attempt to obtain an appraisal and award by arbitration because of the disagreement between himself and the company as to the amount of the loss, held, under the particular terms of the policy in suit, not a condition precedent to recovery upon the policy, but to constitute matter of defense to be specially pleaded in bar of the action.

5. **INSURANCE POLICIES**—*how construed.* When it is once established that the meaning of any provision in an insurance policy is ambiguous or capable of two constructions, then all doubt as to its proper construction vanishes and it must receive that interpretation most favorable to the insured.

6. **"REQUIRE"**—*defined.* "Require" construed as synonymous with "demand" and "exact."

7. **GENERAL ISSUE**—*effect of pleading.* By pleading the general issue, all dilatory defenses, all matters merely in suspension or abatement of the action, are waived. Therefore, even if submission to arbitration be considered a condition precedent, failure to allege performance of the condition can only be taken advantage of by demurrer or special plea.

Action of assumpsit. Appeal from the County Court of Cook County; the Hon. WILLIAM H. HINEBAUGH, Judge, presiding. Heard

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in this court at the October term, 1904. Affirmed. Opinion filed May 29, 1905.

Statement by the Court. The appellee sued appellant in the County Court of Cook county for a loss on an insurance policy. The declaration contained a special count on the policy, reciting it in *haec verba*, and the common money counts. The defendant pleaded the general issue only.

The cause was submitted to a jury in due course, and the jury found a verdict for the plaintiff for \$860, being the full amount of the policy and interest thereon at five per cent. for one year and six months. The proofs of loss were made and delivered to the company one year, eight months and ten days before the trial.

A written motion for a new trial was made by the defendant, alleging that the court admitted improper evidence on the part of the plaintiff at the trial, "in that the plaintiff and other witnesses were allowed to testify from memorandums which were not competent, said witnesses having no independent recollection of the facts stated by them;" also alleging that the plaintiff's right to recover in the case, if any he had, was "for the amount determined by appraisal and award according to the terms of the policy, wherefore the evidence of the plaintiff tending to show the value of the goods claimed to have been damaged or destroyed was incompetent," and that the court should have instructed the jury to find for the defendant at the close of the plaintiff's evidence, and should have done so when the motion to that effect was renewed at the close of all the evidence. Further the motion for a new trial declared that the verdict of the jury was against the weight of the evidence and was excessive. The motion for a new trial was overruled, and the defendant then moved in arrest of judgment on the ground that the plaintiff's declaration was insufficient "to sustain a verdict and judgment, in that same did not set forth an award or appraisal or any waiver of said award, as required by the said policy of insurance." The court

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overruled this motion for arrest of judgment and gave judgment on the verdict for \$860, from which judgment the defendant appealed to this court, where its assignments of error raise the questions suggested in the trial court by its motion for a new trial and its motion in arrest of judgment.

The policy of insurance which was sued on was for \$800. It covered a certain stock of caskets and other goods usual in an undertaker's establishment, on which the insurance was \$425, and also the store and office furniture and fixtures, on which \$375 was placed—all being at 3913 Cottage Grove avenue in Chicago.

The policy contained various provisions concerning the steps to be taken after a loss to ascertain and determine the amount which the company should pay. These provisions will be mentioned in the opinion following.

The special count of the declaration contains the following averments:

"And the plaintiff avers that afterwards, and before the expiration of the said time limited in said policy, to-wit: on the 7th day of April, A. D. 1902, the said property was accidentally and by misfortune totally consumed by fire, of which loss the said plaintiff forthwith gave notice to the defendant, in writing, and as soon as possible thereafter, to-wit: on the same day, delivered to the defendant a particular account thereof, under his hand, stating what other insurance had been made on the same property, and stating the whole value of the property insured and the manner in which the building in which the loss occurred was occupied at the time of the loss and how the fire originated, and the plaintiff did duly perform all the acts and things required of him by said policy; yet the defendant, although often requested, and though more than sixty days have elapsed since the delivery of said proofs of loss, has not paid the said money or any part thereof to the plaintiff."

At the trial evidence tending to show a disagreement after the fire between the insured and the insurer as to the amount of loss was offered by the plaintiff, and the defendant produced the testimony of its insurance adjuster that the plain-

tiff before the suit was brought asked him if the company was ready to pay him the loss. The witness said, "I told him no. He wanted to know why. I told him we could not possibly agree to his statements. He says, 'What do you propose to do?' I said, 'It is not a matter for us to take care of now; I haven't anything more to say.' 'Well,' he says, 'What would you do?' I said, 'I can only refer you to the conditions of your policy.' That was all the conversation. I have not seen him since."

There is no averment in the pleadings, nor any evidence in the record, that "an appraisal or award" was ever, after the loss, requested or spoken of by either insurer or insured, nor anything in the record, before the motion for a new trial, to show that the absence of such an appraisal or award was relied on as a defense to the action.

CHARLES B. OBERMEYER, for appellant.

FRANK M. FAIRFIELD, for appellee.

MR. JUSTICE BROWN delivered the opinion of the court.

Appellee's counsel in this case devotes more attention in his argument to the proposition that because the bill of exceptions does not certify that it contains all the evidence in the cause, we cannot consider the attack made on the judgment by the appellant, than he does to the merits of the objections urged to that judgment. This is unfortunate, because we are very clear that they are properly before us. We thought it was well understood that this court is committed to the doctrine that although there ought to be a certificate in a bill of exceptions that it contains all the evidence, if such be the fact, yet the mere absence of such a certificate, if it plainly appears in some other way that all the evidence is so contained in the bill, will not prevent such bill from being considered as covering all said evidence. *Mullin v. Johnson*, 98 Ill. App. 621; *Henline v. Brady*, 110 Ill. App. 82. In this case it does so plainly appear in more than one way, and we shall consider this case on the merits,

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which deserved more attention from the appellee's counsel in his argument than he has given them.

A minor point in the complaint made by appellant of the judgment in this case is that the trial court, after the defendant had rested, allowed the plaintiff to be recalled to testify as to the "interest on the amount of loss up to the present time." To this appellant objected because it was not proper rebuttal. This is not ground for reversal unless it plainly appears that by the exercise of his discretion in allowing the irregular order of proof, the trial judge has clearly done injustice. *Chicago & Iowa Railroad Company v. Duggan*, 60 Ill. 137; *Maxwell v. Durkin*, 185 Ill. 546. It is claimed by the appellant that the verdict is in any event excessive, because the interest sworn to by appellee was added to the amount of the policy. This would be true to the extent of the interest for about fifty days, if, as the abstract would seem to indicate, the interest had been computed and added from the date of the service of the proofs of loss to a date ten days before the trial. But the amount itself shows that there was not added to the amount of the policy interest on \$800 for twenty months (from May 30, 1902, to January 30, 1904) at five per cent, but interest for eighteen months, and the record shows that this was what the witness called the \$60—that is, it was interest on \$800 from July 30, 1902, when, if ever, the loss became payable under the terms of the policy.

The appellant also complains that incompetent and improper evidence concerning the articles destroyed by the fire was admitted by the court over its objection. He says that copies of "lists prepared by appellee and his clerk ten days after the fire, and the statement of appellee and his said clerk *made to the jury from the said lists*, were admitted in evidence," and that appellee testified that he had no independent recollection of the articles destroyed by the fire, nor of their value. We do not think this is a fair statement of appellee's testimony. Without quoting from the record what he did say, we will say that both he and Mr. Johnson, as we read the record, positively swore both as to the items

and the value, and we think no injurious error as to the testimony of these witnesses was committed by the trial court.

Something is said in appellant's brief and arguments concerning the non-payment of premium for the policy; but we do not gather that it is seriously insisted on, either as defeating the right of the plaintiff to recover or as diminishing his claim under the policy. The policy was delivered and became an executed contract, and the right of cancellation, which it provided for, was never exercised. There was no plea of set-off in the case, and the appellee testified that he did not assent to a proposition that the premium should be deducted from the amount of the settlement, but promised to give a check for the premium if the amount of the policy was paid in full to him.

The principal objection made by the appellant to the verdict and judgment, however, is that without proof by the plaintiff of an appraisal and award, expressed by affirmative word or conduct, no verdict for the plaintiff for any amount could be sustained. Appellant goes farther, and urges that without a specific averment in the plaintiff's declaration of such appraisal and award, or of such a waiver, no cause of action is stated thereby.

The question turns upon whether under the terms of the policy involved, in case of a disagreement as to the loss—such as is shown by this record—the “appraisal and award” mentioned in the declaration, are necessary and indispensable “conditions precedent” to a suit, or whether, on the contrary, the failure, neglect or refusal of the plaintiff to secure, or to participate in securing, such an appraisal and award, is a matter of defense to be averred and proven by the defendant if it would escape liability.

We are of the opinion, after a careful consideration of many other authorities, as well as those cited in the appellant's brief (which latter, as we have indicated, are ignored by appellee in his argument), that it is a matter of defense and not a condition precedent to a suit. To decide otherwise would be, in our opinion (repeating the quotation used

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by appellant in another connection), to contradict the maxim that "that which is not reason is not law."

The policy, as shown by the statement prefixed to this opinion, says indeed that the "ascertainment or estimate" shall be made by the insured and the company, or, if they differ, then by appraisers *as hereinafter provided*," and that the sum for which the company is liable shall be payable sixty days after notice, ascertainment, estimate and satisfactory proofs of loss have been received by the company, etc.; but this language is not to be construed as ousting the courts of jurisdiction to enforce a payment of a loss where some objection has been made to the amount claimed in the proofs of loss duly made, but no request, demand or suggestion has been made by the insurer that appraisers should be appointed. This is evident in the case of this policy by the language in which the appointment of appraisers is thereafter "provided for." Should a fire occur, the insured shall in any event do certain things with the damaged and undamaged property covered by the policy, make a complete inventory, etc., with the *cost* and *amount* claimed on each article, and render this statement to the company with (among many other items) a sworn statement of the cash value of each article on which loss is claimed. Then, *if required*, the insured shall furnish verified plans and specifications of buildings, etc., destroyed or damaged. *If required*, he shall furnish a magistrate's certificate to certain things. As often as *required*, he shall exhibit, etc., the remains of any property described in the policy, and the books of account, of his business, etc.

After all these provisions comes the condition that "in the event of disagreement as to the amount of the loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, *the insured and the company each selecting one*, and the two so chosen shall select an umpire, etc., and the award in writing of any two shall determine the amount of such loss, etc. The company shall not be held to have waived any provision or condition of the policy or any forfeiture thereof by any *requirement*, act or

proceeding on its part relating to the appraisal, and the loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss *herein* required, have been received by the company, *including an award by appraisers when an appraisal has been required*. Nor shall "any suit or action on this policy for the recovery of any claim be sustainable, etc., until after full compliance by the insured with all the foregoing *requirements*," etc.

"To require," according to the standard definitions, means "to demand," "to exact," "to insist upon having, as indispensable;" and according to the natural purport of the language of the policy, therefore, it is only when in addition to various matters made indispensable by the policy itself, an appraisal has been "exacte*d*," that it is necessary to bring the "award" to the notice of the company in order to fix the amount of loss. "Exacte*d*" by whom? By the company naturally, which has to select one of the appraisers, which already has "exacte*d*" and has before it the sworn and itemized statement of the loss as claimed by the insured under his contract, and which, if it is dissatisfied therewith, is plainly, in right reason, the party to take the initiative in securing such a *quasi*-judicial settlement. The company is not foreclosed from defense against the general liability claimed in the policy because it did not "require" the appraisal, nor would be so foreclosed if on demand it had refused to appoint an appraiser. Why should the other party entering into this agreement for an "arbitration" be foreclosed from prosecuting his claim because he did not demand what he could not have compelled the other party to perform? The contract as drawn is drastic enough in the obligations under which the insured is laid; it should not be rendered by construction unduly and unnecessarily more severe.

As the Circuit Court of Appeals of the United States said in *Kahnweiler v. Phenix Insurance Co.*, 67 Federal Reporter, 483, "When it is once established that the meaning of any provision in a policy of insurance is ambiguous or capable

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of two meanings, then all doubt as to its proper construction vanishes. It must receive that interpretation most favorable to the insured." In so holding the Circuit Court of Appeals followed the Supreme Court of the United States, which has said that if a policy is susceptible of two different constructions, the one will be adopted most favorable to the insured, and that this rule "recognized by all the authorities is a just one, because these instruments are drawn by the company" (*National Bank v. Insurance Co.*, 95 U. S. 673), and agreed with the Supreme Court of Illinois, which has expressed itself in the same sense in *Niagara Fire Insurance Co. v. Scammon*, 100 Ill. 644; *Healey v. The Mutual Accident Association*, 133 Ill. 556, and *Phenix Insurance Co. v. Stocks*, 149 Ill. 319.

Our view of the policy under discussion here we think not only reasonable, but supported by the authorities. Thus Joyce on Insurance, sec. 3258, says that "Where the policy provides for an award to settle any dispute as to the value of property destroyed and that suit must be brought within a year, the provision for an award will be held to be waived by the insurer if he fails to make a demand for arbitration," and to this is cited *Tilley v. Connecticut Fire Insurance Co.*, 86 Va., 811, and *Randall v. American Fire Insurance Co.*, 10 Montana, 340; both which cases bear out the citation. The opinion of the Supreme Court of Montana, both in its reasoning and its citations, is elaborate and satisfactory.

The same view is stated with great clearness and vigor by Judge Caldwell in the case above cited, of *Kahnweiler v. Phenix Insurance Co.*, *supra*, and sustained also by the opinion of the Supreme Court of Wyoming in *Kahn v. Traders Insurance Co.*, 4 Wyoming, 419, and of the Kansas Court of Appeals in *Liverpool & London & Globe Insurance Company v. Hall*, 1 Kansas Appeals, 18.

It is quite clear that if a waiver by the insurer of the provision for appraisal is to be presumed from his merely failing to make a demand for it, as is laid down by Joyce, and the cases which we have cited, he must, as a matter of pleading, set up in defense such demand and the failure or neglect

of the insured to comply with it, if he would make it available for his protection from liability. The allegation of the insured that "he duly performed all the acts and things required of him by said policy," is sufficient. If the insurer relies on the default or misconduct of the insured in this particular regard to defeat the action, he must specially plead it.

Joyce on Insurance, sec. 3264, says: "If the insurer relies for a defense upon non-compliance with the arbitration and award clause in a policy, such clause must be specially pleaded," and cites thereto *Kahnweiler v. The Phenix Ins. Co.*, *Kahn v. Traders Ins. Co.*, and the *Liverpool & London & Globe Ins. Co. v. Hall*, *supra*.

While it is true that provisions of the Codes of some States have altered, in the direction of greater liberality, the common law with reference to the particularity with which the performance of conditions must be pleaded by a plaintiff, and have therefore rendered cases in such jurisdictions of less weight here, on this particular point, than they would otherwise be, we think that the statement of the text writer is correct as applied also to common-law practice. It had long been the law of England, under the Common Law Procedure Act, even before recent reforms in the practice, that the performance of all conditions, even when strictly conditions precedent, might be alleged generally by a plaintiff in a suit on a contract, leaving to the defendant the right of specially pleading their breach. Moreover, by the common law in its strictness as suggested by Judge Caldwell in *Kahnwiler v. Phenix Insurance Company*, if the securing an appraisal and award were, in any given case, held strictly conditions precedent, the failure to show a compliance with them would not bar or extinguish the action nor justify a judgment *nil capiat*, but only of "abatement until after an award shall have been obtained fixing the amount of the loss." The defense, in other words, would be dilatory, and not peremptory. But by pleading the general issue all dilatory defenses, all matters merely in suspension or abatement of the action, are waived. It would seem to follow that a failure to allege

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the performance of such assumed conditions precedent on the part of the plaintiff could, in any event, only be taken advantage of on demurrer, and not as attempted in the present case, on objection to evidence or by motion in arrest of judgment. And it would equally follow that if a demurrer were not thus interposed to the declaration, special pleas by the defendant and the proof by him under them of failure of performance of such conditions, would be necessary to render it available as a defense.

The various cases cited by the appellant's counsel have all been examined by us, and where they are of authority can be distinguished from the case at bar. The language used in them must be considered with reference to the fact that they differ from it in one or more of the following particulars: The provisions of the policy under discussion were such as clearly to declare that no liability could accrue without or before an award; or a demand for the appraisal had actually been made by the insurer and refused by the insured; or an appraisal and award having actually been made, the insurer claimed that he was not bound thereby; or at the least, the defendant had set up as a defense, by plea or in the evidence, that appraisal and award were necessary, under the facts of that case, to a recovery, and had not been obtained, or the plaintiff's complaint in itself showed affirmatively the same things.

Mosness v. German American Ins. Co., 50 Minn., 341, (the citation connected with the section cited by the appellant from *Joyce*), falls within the third and fourth of these classes. The complaint of the plaintiff itself showed the difference had arisen as to the value, as well as the provision of the policy for an award, and the subsequent pleadings showed that an award had been made and the insured had refused to be bound by it.

In *Carroll v. Girard Ins. Co.*, 72 Cal., 297, also, there was actually an award. The defendant set it up and the court says that the action should have been on that award, and not on the policy.

The earlier California case of *Adams v. Insurance Com-*

panies, 70 Cal., 198, cannot be so clearly distinguished, but it does not appear what the pleadings were in that case, nor whether or not the defendant did not plead the absence of an award as a matter of defense.

In *Vernon Ins. & Trust Co. v. Maitlen*, 158 Indiana, 393, the plaintiff's complaint averred that the insured and insurer differed as to the amount of the loss, and that the insurer demanded an arbitration, and yet did not aver any sufficient excuse for not producing an award. The complaint was of course, therefore, bad, if the contract was a valid one.

The *Chippewa Lumber Company v. The Phenix Insurance Company*, 80 Mich., 116, plainly falls within the first class described. The language of the policy was without qualification, that "no suit should be sustainable until after an award," and this it was expressly agreed should be a condition precedent.

The case at bar is more like *Nurney v. The Firemen's Fund Insurance Company*, 63 Mich., 633, referred to and distinguished in *Chippewa Lumber Co. v. Phenix Ins. Co.* In the *Nurney* case the Supreme Court of Michigan held that where either party had the right to demand an appraisal or arbitration and neither did so demand it, the arbitration must be deemed waived by both, and the plaintiff left to the mode of redress provided by law. "The agreement," the court says, "to arbitrate never became operative, and the agreement not to sue being dependent on the agreement to arbitrate, of course must also have become inoperative."

In *Fisher v. The Merchants Insurance Co.*, 95 Maine, 486, the language of the policy was different. Arbitrators were appointed and made an award, and the plaintiff in his declaration averred all this, but failed to aver the invalidity of the award.

In *Westenhaver v. The German American Insurance Company*, 113 Iowa, 726, the defendant pleaded the absence of an appraisement and its own attempt to secure it, and the case turned on the refusal of the plaintiff to proceed with such an arbitration.

In *Manufacturing Co. v. Assurance Co.*, 106 N. C., 28,

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the defense was affirmatively made by the insurer, that a difference arose, that the insurer made a written request for arbitration and that the plaintiff refused to comply with the request.

In *Providence Washington Ins. Co. v. Wolf*, in the Appellate Court of Indiana, reported 72 N. E. Rep., 606, the case turned upon pleadings which raise the issue whether certain conduct stated constituted a waiver of an appraisal by the insurer.

In *Insurance Co. v. Carnahan*, 63 Ohio State, 258, the defense was affirmatively pleaded by the insurance company that there had been a disagreement, that arbitration had been demanded, but that no arbitration had been had as provided.

The various courts, in deciding the cases, may have used language seemingly inconsistent with the view we take of the questions involved here, but we see nothing in them on analysis which should compel or influence us to a different opinion.

The Illinois cases cited by appellant do not establish its contention.

The language of the learned judge of the Appellate Court in the Third District, in the *Phoenix Insurance Co. v. Lorton & Co.*, 109 Ill. App., 63, although entitled to respect, is not binding on us, and in that case it does not appear what the pleadings were. It does appear in the opinion, however, that the company, by its representative, had demanded an appraisal.

Johnson v. Humboldt Ins. Co., 91 Ill., 92, is not at all in point. There is in it only the dictum, self-evidently true, that where the language of a policy provides that no suit shall be sustainable until after an award, the award is indispensable to sustain the suit.

The quotations in counsel's argument from the *Continental Life Ins. Co. v. Rogers*, 119 Ill., 474, do not involve the point decided in the case. The judgment in that case against the insurance company was affirmed. As "promotive of justice," matters which were urged as conditions precedent

were held not to be so, and the court says that when the making of its policy, its terms, the payment of the premium, the death of the assured and the giving of notice and making proofs thereof to the company were proved, "a *prima facie* right of recovery was made out against the defendant which the latter was bound to meet by some affirmative action, otherwise the plaintiff was entitled to judgment."

The Phenix Ins. Co. v. Stocks, 149 Ill. 319, is another case in which the judgment against the insurance company was affirmed, in the face of objections that "conditions precedent" were not averred and proved by plaintiff. In this case the language of the policy was that no suit should be sustainable until "after an award shall have been obtained fixing the amount of such claim in the manner above provided," (i. e., by appraisal), "which is agreed to be a condition precedent," and the court says that in construing these and like clauses that construction is to be adopted which is most favorable to the insured, and that placing objection to payment on other grounds than a want of arbitration waived such arbitration. The opinion further declares that in cases where it is the right of either party to demand arbitration, it is right of the parties to waive it, and if no demand is made therefor, it will be presumed to have been waived.

Niagara Fire Ins. Co. v. Bishop, 154 Ill., 9, merely decides that a contract in the policy precluding suit until appraisal has been made, is not invalid as an attempt to oust the courts of jurisdiction. The failure to secure an award was set up in the case as a matter of defense by special pleas, and the judgment was finally affirmed on the ground that on the issues made by those pleas and the replications thereto, the proof showed that appellant was to blame for the failure of the appraisal.

The judgment of the County Court is affirmed.

Affirmed.

**Pittsburgh, Cincinnati, Chicago & St. Louis Railway
Company v. Mollie Bovard, Administratrix.**

Gen. No. 11,974.

1. **SPECIAL FINDING**—*when conclusive.* A special finding is deemed conclusive on appeal where it is not attacked in the written motion for a new trial specifying grounds therefor, nor in the assignments of error.

2. **FELLOW SERVANTS**—*what essential to relation of.* In order that servants be regarded as fellow servants, they must be employed by a common master; likewise they must, at the time of the accident, have been co-operating with each other in the particular work in hand, or else their relations toward each other must be such that they could exercise upon each other a mutual influence promotive of proper caution.

Action on the case for death caused by alleged wrongful act. Appeal from the Superior Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed May 29, 1905.

Statement by the Court. This is an appeal by the defendant (the appellant) from a judgment of the Superior Court of Cook County rendered on the verdict of a jury against it in favor of the plaintiff (the appellee) for \$5,000.

The appellee sued under the statute as administratrix for negligence causing the death of the intestate, her husband.

The first count of the declaration alleged that the defendant so negligently managed a locomotive engine, by its servants, as to kick a caboose car down an inclined track controlled by said defendant, run it upon the deceased, George Bovard, "while with all due care and diligence he was walking along said tracks with the knowledge and consent of the defendant," and thereby throw him against another locomotive and kill him.

An additional count alleged that the defendant was doing certain switching with an engine and caboose, in the railroad yards of a certain other railroad company in Chicago, and so negligently managed said engine and caboose in doing said switching that the caboose was kicked with great force down an inclined track against another engine, and "that the deceased was then employed by said other railroad company to work in said yards, and while in the discharge of his duty as such employee, and while exercising ordinary care for his own safety he was then and there caught and so crushed and injured by and between said caboose and engine that as a result of his injuries he died.

The defendant pleaded the general issue. On the trial the jury were requested to return an answer to this question: "In view of all the evidence and instructions of the court, was the deceased at and before the time of the injury in question a fellow servant of or with the engineer, fireman, conductor and switchmen who belonged to said engine by which said caboose was kicked down said track?" To this question with their verdict they returned the answer "No."

The defendant moved for a new trial on these grounds: 1. The court's admission of improper evidence for the plaintiff. 2. The court's exclusion of proper evidence for the defendant. 3. The court's allowing counsel for plaintiff to argue the question of damages in his closing address to the jury. 4. The court's refusal to allow counsel for defendant to address the jury in reply to the closing address of plaintiff's counsel on the question of damages. 5. The court's refusal to take the case from the jury at the conclusion of the evidence by a peremptory instruction for the defendant. 6. The court's giving of erroneous instructions asked by plaintiff. 7. The court's refusal of a proper instruction requested by defendant. 8, 9, 10 and 11. That the verdict was against the evidence, the great weight and preponderance of the evidence, the law of the case, and the instructions of the court. 12. That the damages awarded were excessive. 13. That the jury were misled by the closing argument for the plaintiff.

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The court overruled the motion for a new trial and entered judgment on the verdict for \$5,000. From this judgment the defendant appealed to this court, assigning as error here the overruling by the trial court of the motion for a new trial.

GEORGE WILLARD, for appellant.

JAMES C. McSHANE, for appellee.

MR. JUSTICE BROWN delivered the opinion of the court.

The attack made by appellant on this judgment centers principally in the proposition made by it, that the deceased and the men handling the caboose at the time of the accident were fellow-servants. So "clearly and unquestionably" were they so, its counsel argue, that the trial judge should have directed a verdict for the defendant according to the instructions asked by it at the close of all the evidence, under the doctrine announced in *Chicago City Ry Co. v. Leach*, 208 Ill., 198.

Further it is said, that error was committed by the court in refusing instruction numbered one, asked by the defendant, as follows:

"If the jury believe from the evidence that at the time in question the defendant with its engines and caboose occupied, and for several years previous thereto customarily occupied, a portion of the said Fort Wayne yard, and that the switching of said caboose and the tending of switches for such work of switching was subject to the control and direction of the yard master, Carne, and that the deceased, in his lifetime and at the time in question, tended some of the switches used in the movements of the engine which did said switching at said time, and that such switching and tending switches at said time was subject to the control and direction of said yard master, then the deceased and said yard master, Carne, were in law the servants of the defendant in the matter of such work of switching and tending switches."

To have given this instruction would have indicated that the trial judge held the same view concerning the question of

fellow-servants in the case that counsel for appellant held. If he did not, its refusal was inevitable.

The objection made by appellant that parts of the argument of appellee's counsel to the jury were misleading and erroneous in their statements of law, derives its point also from the theory of "fellow-servants," which appellant believes applicable to this cause.

To all these grounds for attacking the judgment the answer is made by appellee that the proposition that the deceased and appellant's servants in charge of the engine and caboose which caused his death, were fellow-servants, cannot be raised in this court. The question is foreclosed against appellant, she insists.

In answer to the question specifically put, the jury found that the deceased at and before the time of the injury in question was not a fellow-servant of or with the engineer, fireman, conductor and switchmen who belonged to said engine by which the caboose was kicked down the track. This special finding must be considered in this court as unchallenged, and as determining the fact, appellee says, because appellant neither alleged in his motion for a new trial nor in his assignments of error, that it was not supported by the evidence or was contrary thereto. To this counsel cites several cases: *Avery v. Moore*, 133 Ill., 77; *Penn. Coal Co. v. Kelly*, 156 Ill., 15; *Empire Machine Co. v. Brady*, 164 Ill., 61. These cases seem to bear out this contention. Such also is the implication in *Illinois Steel Co. v. Mann*, 197 Ill., 186, in which the court says: "A party is no more bound by special findings of a jury than by the general verdict, and if he believes that the jury have erred, he is entitled to his motion for a new trial *on that ground*, and may take his appeal."

But even if the charge made in the motion for a new trial, and in the assignments of error, that the general verdict was against the weight of the evidence, should be considered to so sufficiently challenge this special finding as to leave its correctness open to our inquiry, it would make no difference

to the result, for we entirely agree with the jury in its conclusion formulated in the special finding.

The evidence did not, in our opinion, show either that the deceased was a servant of the same master as the persons involved in the alleged negligence, or that he was co-operating with them at the time of the accident in the same work, or that he was ever in such relations with them that he could exercise upon them, or they upon him, any mutual influence promotive of caution.

The claim that the men in charge of the caboose and the deceased were fellow-servants of the Pan Handle Road, because the yard master of the Chicago, Pittsburgh & Ft. Wayne Road had over both of them a certain direction and control, while the caboose crew, as employees of the Pan Handle, were in his yard with their engine and train, is manifestly unsound. The analogy suggested by appellee's counsel of a person who boards his horse at a livery stable is not inapt. So far, therefore, from believing that the deceased and the men handling the caboose were "clearly and unquestionably fellow-servants," we think that they were clearly and unquestionably *not* fellow-servants, and that to leave the question to the jury, under the instructions which were given them on the subject, was a course more favorable to the appellant than it had a right to require.

Our opinion upon this matter practically removes from this case all the questions raised by appellant except that of damages, and the ruling of the court in relation to the arguments thereon. We will say, however, that we see no error in the instructions. The instruction numbered 2, given at the instance of appellee, is not open, we think, to the objections made to it. In connection with the others it could not have misled the jury.

We do not regard the damages as excessive. It is sufficient to say in relation to the objection made, that the court should have prevented counsel for appellee from arguing the question of damages in his last address to the jury, or have allowed appellant's counsel to reply, that there is nothing in the record sufficient to show the basis of such complaint,

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namely, that the subject of damages had not before in the argument been discussed.

Manifestly the quotations from counsel's remarks to the trial court, given in the reply brief of appellant, do not sufficiently show it. They are but the statements of counsel to that court in argument, and however unimpeachable his character for veracity, we cannot take them as the certified record of a fact. But we do not mean to imply that we should hold, even if the fact in question did appear in the bill of exceptions, that the court's action was erroneous.

The judgment of the Superior Court is affirmed.

Affirmed.

Josiah C. Fleming, et al., v. Charlotte J. Ludington, et al.

Gen. No. 11,956.

1. PEREMPTORY INSTRUCTION—*what question at issue upon application for.* The question at issue in judging as to whether a peremptory instruction should be given or refused, is whether there is any evidence in the record which, with all reasonable inferences and intendments to be drawn therefrom, legally tends to establish the plaintiff's case, the effect of all modifying and countervailing evidence being laid out of view.

Action of assumpsit. Appeal from the Superior Court of Cook County; the Hon. JESSE HORDOM, Judge, presiding. Heard in this court at the October term, 1904. Reversed and remanded. Opinion filed May 29, 1905.

DARROW, MASTERS & WILSON, for appellants.

LYMAN, BUSBY & LYMAN, for appellees; LEONARD A. BUSBY of counsel.

MR. JUSTICE BROWN delivered the opinion of the court.

This is an appeal from a judgment in favor of the defendants below, in a suit which was brought for commissions alleged by the plaintiffs to have been earned in bringing about the leasing for a long term of a certain piece of property in Chicago. The cause proceeded to trial on pleadings

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consisting of a declaration on the common counts only and a plea of the general issue. At the conclusion of the plaintiff's evidence the defendants moved the court to direct a verdict for the defendants on the ground, in effect, that there had been no evidence introduced which could support a verdict for the plaintiffs, but that the evidence showed affirmatively that the plaintiffs had earned no commissions. This motion the court denied. The motion, however, was renewed at the close of defendants' case, on substantially the same expressed grounds, the principal difference in the written motions being that certain propositions in the motion at the close of plaintiffs' case are introduced with the words, "Plaintiffs' evidence shows," and that to substantially the same propositions in the motion at the close of all the evidence are prefixed the words: "The uncontradicted evidence conclusively shows." This last motion was granted and the requested instruction given.

Counsel for appellees justify this action of the trial court under the following proposition. They say: "Where the evidence with all the inferences that a jury could justifiably draw from it, is so insufficient to support a verdict for the plaintiff that such a verdict if returned must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendants." As authority for this doctrine they cite *Simmons v. Chicago & Tomah R. R. Co.*, 110 Ill., 346; *Bayer v. C. M. & N. R. R. Co.*, 68 Ill. App., 219, and a number of other cases, and declare that the law of this State is so "settled beyond all question."

In several late cases, however, the Supreme Court has declared this not to be the law.

In *Woodman v. The Illinois Trust & Savings Bank*, 211 Ill., 578, the Supreme Court criticises the language used in *Simmons v. The Chicago & Tomah R. R. Co.*, and quoting and reaffirming its utterances in *Frazer v. Howe*, 106 Ill., 563, *Rack v. Chicago City Railway Co.*, 173 Ill., 289, and *Chicago City Ry. Co. v. Martensen*, 198 Ill., 511, say that the question at issue in judging of a peremptory instruction for the defendant, is whether there is any evidence in the

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record which, with all reasonable inferences and intendments to be drawn therefrom, legally tends to establish the plaintiff's case, the effect of all modifying and countervailing evidence being laid out of view.

The rule contended for by appellees' counsel here would, the Supreme Court says in *Chicago City Ry. v. Martensen*, 198 Ill., 511, leave the right of trial by jury to the judgment and discretion of the court, and is not to be seriously regarded.

This court has of course followed in its decisions the doctrine laid down by the Supreme Court. *Ware v. The Illinois Central R. R. Co.*, 119 Ill. App. 456.

Applying the test thus declared to be the correct one in the case at bar, we cannot hold the instruction of the trial court, at the close of all the evidence, justified. We hardly think the court intended to apply that test, inasmuch as had it done so its decision on the motion at the close of all the evidence would probably not have differed from that on the motion at the close of plaintiffs' case. We must therefore reverse and remand the cause for a new trial.

As this case must be again tried, we do not discuss the evidence or its weight or effect. We have considered it only with reference to the question above indicated in relation to the peremptory instruction.

The judgment of the Superior Court is reversed and the cause remanded.

Reversed and remanded.

David Miller, et al., v. Calumet Lumber and Manufacturing Company, et al.

Gen. No. 11.968.

1. **MECHANIC'S LIEN**—when original and amended petitions for, do not state different causes of action. Where the original and amended petitions filed in a mechanic's lien proceeding ask for the same lien upon the same premises, are based upon the same con-

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tract between the same owner and the same original contractor, and name the same parties defendant, etc., it cannot be said that the amended petition states a new cause of action.

2. **STATUTE OF LIMITATIONS—purpose of.** The underlying purpose of Statutes of Limitations is to prevent the unexpected enforcement of stale claims concerning which persons interested have been thrown off their guard by want of prosecution. This is especially true of short limitations, in lien laws.

3. **MECHANIC'S LIEN—when subcontractor's contract sufficient.** A subcontract may be pursuant to the original contract notwithstanding it fixes a time limit for performance beyond that provided in the original contract.

4. **MECHANIC'S LIEN—when notice of claim sufficient.** A notice of a claim for mechanic's lien is not required to state "when the material was to be delivered" nor "that there was any fixed time when it was to be delivered" nor "when payments were to be made."

5. **MECHANIC'S LIEN ACT—how construed.** Provisions of the Mechanic's Lien Act are not to be construed so as to render the remedy thereby provided impossible of enforcement.

6. **MECHANIC'S LIEN—decree for, held sufficient.** Held, that the findings of the decree entered in this case constitute a compliance with section 32 of the Lien Act.

7. **MECHANIC'S LIEN—burden of proving damages in mitigation of the amount of.** Under the Mechanic's Lien Act the burden of proof is upon the owner to establish what damages, if any, should be awarded him in mitigation of the amount claimed by way of lien.

8. **MECHANIC'S LIEN—when decree for, sufficient.** A decree declaring a mechanic's lien in favor of a subcontractor is not erroneous in not making the contractor a party thereto, where it appears from the evidence that the contractor was beyond the jurisdiction of the court.

9. **MECHANIC'S LIEN—nature of proceeding for.** A mechanic's lien proceeding under the Illinois practice is a suit in chancery.

10. **DEPOSITIONS—when competent in subsequent suits.** Depositions taken before a master in a mechanic's lien proceeding prior to the first appeal therein are competent to be admitted at a subsequent hearing of said suit following a reversal therein,—the parties to the issues remaining substantially the same.

11. **COSTS—what not improper taxation of.** Held, that the chancellor in taxing the costs against the losing party did not abuse his discretion by including in such taxation the master's fees incurred upon an earlier hearing which resulted in an erroneous decree, where the master's service consisted largely in the taking of evidence which was used upon the subsequent hearing.

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Mechanic's lien proceeding. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed May 29, 1905.

Statement by the Court. This is an appeal from a decree of the Circuit Court of Cook County, giving a mechanic's lien to appellees on premises belonging to appellants and providing for the enforcement thereof.

The original bill of complaint in the cause was filed by the Calumet Lumber and Manufacturing Company November 6, 1901. The Chicago Heights Lumber Company, the other appellee herein, filed an intervening petition November 9, 1901. The bill of complaint was amended December 17, 1901, and the cause came after hearing to a decree in the Circuit Court April 17, 1902.

The allegations of the original bill condensed are: (1) the ownership of certain described premises by defendants, David Miller and Isadore Miller; (2) a written contract between one Frink and them for the erection of a building on said premises, to be completed on or before September 1, 1901, for \$5,325 (appending said contract as an exhibit); (3) an oral contract between Frink and the complainant, The Calumet Lumber and Manufacturing Company, for material for said building, for \$885, delivery to be completed by complainant within four months from June 24, 1901, and final payment to be made within thirty days thereafter; (4) the complete execution of said agreement by complainant; (5) the furnishing of extras by complainant at the request of Frink to the amount of \$35.86; (6) notice of the claim for mechanic's lien by complainant served on appellants October 26, 1901; (7) that neither of the owners has required of Frink any statement of the persons having subcontracts, and that no one has requested of complainant any statement concerning this agreement with Frink (as provided for in sections 5 and 23 of the Mechanic's Lien Law), that any payments made by appellants to Frink are therefore void as against complainant; (8) the completion of the building by Frink according to his contract, and that

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there is consequently due to Frink therefor \$5,325; (9) the unknown interest of David Miller, trustee, and certain note holders, The Chicago Heights Lumber Company and William Frink, and the interest, as wives of the owners, of Hannah Miller and Nattille Miller in the premises, all subsequent to that of complainant; (10) that by reason of the foregoing, the complainant is entitled to a lien for \$885 and interest, \$35.86 and interest, and \$100 attorney's fees.

The amendment of December 17, 1901, altered the allegation above numbered 8, so as to make it say that complainant did not know whether Frink had performed his contract completely and asked a disclosure concerning it, and that if Frink had not done so, yet the labor and materials which he had furnished in pursuance of said indenture, were "reasonably worth, according to the original contract price fixed in said indenture, to-wit: \$5,325, after deducting so much as shall have been rightfully paid on said original contract by said owners, and damages, if any, that may have been occasioned said owners by reason of the non-fulfillment of said original contract by said Frink if the same was not fulfilled by him; that, as aforesaid, no payments whatsoever in respect to said improvement of said indenture ever were at any time rightfully or otherwise made by said owners to said Frink on account of said indenture or the things done thereunder by said Frink."

The intervening petition of the Chicago Heights Lumber Company set up a contract between Frink and itself for materials to the amount of \$777.95, to be furnished within 90 days from June 26, and to be paid for on completion of delivery; alleged that there was \$322.22 due on said contract, and unpaid, and that if any payments had been made to Frink and the appellants they were void as against the Chicago Heights Lumber Company, and made in other respects the same allegations as the bill of the Calumet Company, except that there was no statement that any sum was due from the owners to Frink.

The decree declared a lien on the premises described in the bill of \$945.12, together with \$90 solicitor's fees, in favor

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of the Calumet Lumber and Manufacturing Company, and of \$332.22, together with \$32 attorney's fees in favor of the Chicago Heights Lumber Company.

From this decree the present appellants, David, Hannah, Isadore and Nattille Miller, appealed to this court. That appeal was heard by the Branch Appellate Court and an opinion was filed therein January 19, 1904, reversing the decree and remanding the cause. This opinion is to be found in 111 Ill. App., 651.

It will be seen by reference thereto that certain assignments of error by the appellants were deemed well taken, which complained that there had been no attempt by the appellees to bring themselves within the provisions of section 32 of the Mechanic's Lien Act, under which alone, the Court held, they could, as the original contractor had failed to complete the building, maintain a suit for a lien. The court said: "Neither the petition nor the intervening petition comply with the requirements of section 32, nor is the evidence sufficient to support a decree under that section."

The specifications in the opinion concerning this failure are: (1) that "the names of the parties employed on such house or improvement subject to liens," were not set forth in the petition or intervening petition (which objection, however, it is implied may have been waived by the failure of appellants to demur specially); (2) that the amount due from the owner to the contractor was not found or declared in the decree; and (3) that there was no evidence in the record upon which such a decree could be based. The opinion closes as follows:

"The decree of the Circuit Court will be reversed and the cause remanded, with leave to appellees, if they choose to avail of it, to amend their petitions and proceed under the thirty-second section of the Lien Act of 1895."

The appellees filed in the Circuit Court the remanding order entered in pursuance of this direction, and redocketed the case, and on March 16, 1904, the complainant, the Calumet Lumber and Manufacturing Company, amended its bill or petition. The amended bill began with a reaffirmation of

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all the allegations contained in the original bill of complaint filed November 6, 1901, with the exception of the paragraph condensed under the heading 8 above, and then proceeded with allegations that for some cause unknown Frink, the original contractor with the appellants, had abandoned the contract which he had for the improvement of their premises, and that at the time of said abandonment had furnished work and materials reasonably worth "according to the original contract price, being the sum of \$5,325 specified in said contract," about \$4,500; that no amount whatever was at any time rightfully paid on said original contract by the owners, and if any payments whatever were made to Frink, or to any one else, they were made without exercising the rights and powers conferred on the owners under sections 5 and 23 of the Mechanic's Lien Act; that within a few days after Frink abandoned the job, the owners moved into said building, which was practically done, and have occupied it ever since, and that the owners completed the building within said few days, and have not been damaged by reason of Frink's failure to complete his job. Also, that the owners and Frink fraudulently conniving, claim that large sums of money were paid out to Frink on account of said contract, and that the owners were damaged by the non-fulfilment of the contract, and that Frink is, in pursuance of said fraud, kept concealed out of the State so that complainants have never been able to find him; that a few days after Frink abandoned his job, the owners represented to complainant in order to induce it to furnish further material, that there was plenty of money due Frink to pay for all materials complainant had delivered or might deliver under its contract with Frink; that the conditions between the owners and Frink were such that complainant would receive payment for all such material; that complainant relied on said representations and delivered material afterward used by the owners, and that the defendants are estopped from setting up any claim as to any payment to Frink or any damages from non-fulfilment of his contract by Frink.

The amended bill further avers that the defendants to the

suit were all the persons interested in said premises of whom it knows, including all persons ever employed in said job.

The Chicago Heights Lumber Company, on March 18, 1904, also amended its intervening petition, such amended petition containing substantially the same allegations as the amended bill of the Calumet Lumber Company, and asserting that all parties employed on the house involved had been paid except the Calumet Lumber Company and itself, and that the owners had paid nothing rightfully under said original contract nor sustained any damages by reason of its non-fulfilment.

The appellants demurred generally to the amended bill of the Calumet Lumber and Manufacturing Company, and the demurrer was allowed to stand to Chicago Heights Company's petition as well. The demurrer being overruled and the defendants ordered to answer, the appellants filed answers to both the amended bill and amended intervening petition, alleging that Frink abandoned work on the building involved long before its completion, when very much less than five-sixths of it had been completed; and denying that the work or material furnished by Frink were "reasonably worth, according to the original contract price, about the sum of forty-five hundred dollars." The answer further alleged that appellants completed said building, and that they are entitled to a large sum for damages under the contract in addition to the money expended for the completion of the building, and that any payments by them to Frink were valid and rightful. They denied the allegations of the amended bill on which the claim for an estoppel was based, and said that complainant and intervening petitioner had failed to comply with the requirements of the Mechanic's Lien Act; that they should set forth the names of the parties employed on the building, and that the amended bill and amended intervening petition respectively set up new causes of action different from those set up in the original bill and intervening petition, and that the same were barred by reason of not being filed within the time prescribed in the Mechanic's Lien Act.

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The cause was referred to a master. By him, over the objection of the appellants, the depositions and exhibits offered in the former hearing before the master, before the cause came to this court the first time, were received in evidence. Other evidence was offered by the appellees and the defendant Wallace, who by a cross-bill set up a mortgage lien on said premises, offered evidence as to such lien (by the subsequent decree recognized as subordinate to appellees' liens, and not involved in this appeal), but the appellants offered no evidence whatever.

The master found the material allegations of the appellees' petitions were proven, and that the work and material furnished by Frink before he abandoned the job, according to the original contract price with the owners, were reasonably worth \$4,500; that the evidence did not show how much the Millers actually paid for the completion of said building after Frink abandoned it, nor what payments were at any time made by the Millers to Frink under their contract with him, but that by reason of the failure of the Millers to comply with section 5 of the statute on mechanic's liens, any payments made by the Millers to Frink upon said original contract were void as against the Calumet Lumber Company and the Chicago Heights Lumber Company, and that it had not been shown that the Millers had suffered any damage on account of the failure of Frink to fulfill his contract; that complainant had tried to ascertain Frink's whereabouts and failed, and that so far as complainant had been able to ascertain, there were no parties but itself and the Chicago Heights Lumber Company claiming mechanics' liens on said building. The master recommended a decree for a mechanic's lien on the building and lot in favor of the Calumet Lumber Company for \$920.86, and interest, and \$90 solicitor's fee, and for \$322.22 with interest and \$32 solicitor's fee in favor of the Chicago Heights Lumber Company. Fifty-two objections were made by the appellants to the master's report, and overruled by him. They were ordered to stand as exceptions in the Circuit Court, and upon hearing by that court were overruled, and the master's report confirmed. All the find-

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ings of fact in said report were refound by the court, and a mechanic's lien with the ordinary provisions and for the enforcement thereof decreed in favor of the Calumet Lumber and Manufacturing Company for \$1,043.60 and \$90 solicitor's fees and in favor of the Chicago Heights Lumber Company for \$367.75 and \$32 solicitor's fees. The decree provided that the defendants should pay the costs of suit, including "the sum of \$67.25 fixed and allowed as the fees of the master herein on the former reference," and the additional sum of \$75 allowed for his fees in the last reference.

From this decree the defendants, David, Hannah, Isadore and Nattille Miller, appealed to this court, where they have made fifty-nine assignments of error.

WILLIAM H. JOHNSTON and ROBERT W. MILLAR, for appellants.

CHESTER FIREBAUGH, for appellees.

MR. JUSTICE BROWN delivered the opinion of the court.

A motion to dismiss the appeal or to affirm the decree of the Circuit Court with statutory damages was made by the appellants in this cause soon after it was entered in this court. The motion was reserved to the hearing in due course. It is now denied. We have considered the appeal on the merits. The objections made to this course because of the alleged informalities in the transcript of the record, we do not think are well taken. By the filing of an additional record by appellants on their suggestion of diminution, and by their also filing under leave of this court the transcript on the former appeal, anything in these objections which might otherwise be material has been met.

The first of the alleged errors of the Circuit Court which is insisted on and argued by the appellants' counsel in this appeal, is that the complainant by its amended bill and the intervening petitioner by its amended petition have each made an entirely new case, distinct and different from the cases set up by the original bill and original intervening petition, and that since the amended bill and amended petition

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were not filed within four months after the dates fixed for final payment under the contracts set up therein, respectively, the complainant and intervening petitioner are barred from maintaining this suit. We do not so view the matter. We think the Circuit Court was right in holding that no new or different causes of action were stated in the amended petitions. They asked for a mechanic's lien, under the statute of Illinois, against the property of certain defendants; the original petitions had asked for the same lien against the same premises. The original and amended petitions were based on the same contracts between the owners and the original contractor, and the same contracts between that original contractor and the petitioners, and described those contracts and the work and materials they respectively called for in the same way. The amended petitions made no new or different parties. We do not see how it can be successfully contended that the later petitions are anything more than the less defective and more artificial method of stating their claim, which is always allowed by way of amendment to parties plaintiff, without rendering them liable to the consequences of having stated a new cause of action.

The gist of the reasons given by the Branch Appellate Court when it reversed the former decree in this cause, was that the amount due from the owner to the original contractor must be ascertained and found before there could be a decree in favor of the claimants. "In this case," the court says, "the amount due from the owner to the contractor is not found or declared in the decree, nor is there any evidence upon which such a decree can be based." It is true that the court also says, "Neither the petition nor the intervening petition comply with the requirements of section 32," but that the court did not think that their amendment would be made futile and ineffective by the four months' limitation is shown by its action in, of its own motion, granting leave for such amendment. It may be conceded that the Circuit Court was bound by this action only to allow the amendments, and had power to have afterward declared them useless, but in so doing it would certainly have disagreed with

the Branch Appellate Court. We agree with the view of that court and of the Circuit Court. The underlying purpose of statutory limitations is to prevent the unexpected enforcement of stale claims, concerning which persons interested have been thrown off their guard by want of prosecution. This is especially true of the short limitations in lien laws. Nothing could be more different from such a situation than the one in this case.

The next contention of the appellants to be noticed is that the contract between Frink and the Calumet Lumber and Manufacturing Company shows on its face that it was not in pursuance of the purposes of the original contract between the Millers and Frink, and therefore does not fall within the Lien statute. The ground for this argument is that the Calumet Company contract (which was oral) included (by reference) the terms of an endorsement upon the estimate on which it was based, to the effect that the delivery of the material furnished was to be completed by the Calumet Company within four months from June 24, 1901, while the contract between the owners and Frink provided that the entire building should be completed on or before September 1, 1901. Hence it is urged the first could not be "in pursuance of the purposes" of the second.

We do not think this conclusion follows. The same estimate which contains "the time memorandum" shows on its face that the materials were contracted for to be delivered to the appellants at the premises involved in this suit, and were so delivered there. The larger part of them had been delivered before September 1, and that part of them delivered after September 1 was so delivered in compliance with the direct request of the appellants after Frink had abandoned the job—a request made in a complete recognition of the character of the Lumber Company's contract—as "in pursuance of the purposes" of Frink's contract with appellants.

The contract between Frink and the Calumet Lumber Company was not inconsistent with the contract between appellants and Frink. There was nothing in it to prevent

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the Calumet Lumber Company from delivering all the material before September 1, 1901. It simply provided a date before which it must be delivered, or the contract would be broken. The material was presumably to be furnished as called for, and a time limit might be as much for the protection of Frink as for the vendor's, in order that he might not be overrun with material before he was ready. He may have known that there was no doubt of his being able to get the material as rapidly as he could possibly need it. At all events, as it has been decided in *Von Platen v. Winterbotham*, 203 Ill., 205, that a subcontract in which there is no time limit whatever may be held to be in pursuance of the purposes of an original contract in which a time for completion is specified; it certainly is not the law that a subcontract in which such a time limit is provided, although the time allowed runs a little beyond that allowed by the original contract, cannot be so held. This objection does not seem to be urged against the intervening petitioner, the Chicago Heights Lumber Company, although by its contract, as alleged, it was to complete the delivery before September 24, 1901. Perhaps this is because the proof shows that its material was in fact all delivered before August 26. In any event we do not regard the position of appellants in this regard tenable as to either of the appellees' contracts, and it is not necessary for us to consider whether or not it is still open to them to take it in this second appeal.

The third objection of the appellants to the decree is that the notice on which the Chicago Heights Lumber Company's right to a lien depends is not in compliance with the statute. We see no merit in this point. Counsel say that the notice does not state "when the material was to be delivered," nor that there was "any fixed time when it was to be delivered," nor "when payments were to be made." The statute does not require that the notice should contain this information. It does provide that it shall state when the amount claimed to be due became due, and the Appellate Court of the Second District in *Hurt v. Sanders Bros. Mfg. Co.*, 99 Ill. App. 665, cited by appellants, decided that a notice was defective

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which did not contain such a statement. The language used in the opinion in that case is simply the demonstration by the writer of it that the notice neither contained the required statement, nor, in other allegations, the means of obtaining the information.

The next complaint of appellants is that the reasonable worth of the work and materials furnished by Frink before his abandonment of the job has not been established by competent proof. The complaint is not well founded.

It is needless to discuss the application of the doctrine of *Sohns v. Murphy*, 168 Ill., 346, to section 32 of the Act of 1895, for we are of the opinion that the testimony of the three witnesses on this matter (and especially that of Mr. Decker), is amply sufficient to sustain the decree under the most rigid construction of the law that appellants could claim. It will not be presumed to have been the intention of the Legislature to make impossible a remedy for which it was carefully providing. We may say, moreover, that we think *Sohns v. Murphy* greatly in point.

It is further objected to the decree that it does not find the amount due from the owners to the original contractor. We think that the findings of the decree, in which are incorporated the findings of the master's report, do sufficiently, under section 32 of the Lien Act and under the opinion of the Branch Appellate Court in the former appeal, "find and declare" how much is due from the owners to the contractors. That sum, by the finding of the master, is said to be \$4,500, and it is also found that all payments, if any were made, to Frink are void under the law, and are therefore as though not made, so far as the appellees are concerned. This ascertains and fixes the amount due as \$4,500, and the claims of the original and intervening petitioners not aggregating this amount, nothing more seems necessary to determine their rights under section 32. That section says that a "balance is to be divided between the claimants in proportion to their respective interests to be ascertained by the court." That "balance" is to be the amount "the work and materials shall be shown to be reasonably worth according to the original

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contract price"—in this case found to be \$4,500—less "so much as has been *rightfully* paid on said original contract by the owner," and less damages, if any, "that may be occasioned the owner by reason of the non-fulfillment of the original contract."

The master and court have found on sufficient evidence, it would appear, that under the definition in section 33 of the Act of rightful payments, no money has been rightfully paid on account of this building so far as the appellees' interests are concerned. It has also found that no damages to the owners appear. These findings fix the amount due to the contractor from the owner at \$4,500.

It is urged that payments may have been made on account of this building by the owners, not "to the contractor or his order," and that these, under section 33, would be rightful, and that there might have been damages not shown by the evidence, which payments and damages, if there were such, should have been deducted from the \$4,500.

It is enough to say concerning this, that by the evidence before them, the master and the court were justified in their findings that there were no such payments or damages proven, and that it was the duty of defendants, after the case made by appellees was closed, to prove any such payments or damages, if any such there were.

The showing made by appellees was quite sufficient *prima facie* for recovery under the Act; and it would be a highly unreasonable construction of that Act which would put upon the parties plaintiff the burden of proving precise and specific negatives in matters concerning which the parties defendant had all the information at hand, and the ability at once to refute the *prima facie* case if it were untrue. Particularly is this the case in regard to damages. It would be impossible for petitioners to negative all possible damage which might in imagination spring from the abandonment of the original contract, but very easy for defendants to show it if it existed. It cannot be properly said that the indefinite evidence, claimed by appellees to show that the premises were not ready for occupancy until October, proved the stipulated

damages under the original contract of \$10 a day for a number of days. How much of the delay, if there were any, was due to the abandonment of the contract, and how much to the fault of the owners, if there were such fault, in not paying the contractor, or how much to alterations (which the contract provides may extend the time), if there were any, are matters which do not appear. If the Act, when speaking of "damages that may be occasioned the owner by reason of the non-fulfilment of the original contract," can be in any event construed to refer to stipulated damages for delay in the nature of a penalty, which we do not believe, certainly it is for the damaged party to show his right to them under the contract.

It is further suggested by appellants that because the decree does not include Frink, who was proven to have left the jurisdiction and to be in parts unknown, it cannot stand against the property of appellants because the statute provides that "the decree shall be entered against the owner and contractor." Such a construction of the Act is unreasonable. The decree seems to us, under the proof made of the contractor's absence, sufficient and proper in form. The objection noted is not among the assignments of error, unless it may be considered as covered by the general one, numbered 59.

It is argued that the depositions taken before the master before the first appeal were improperly admitted in evidence by him at the last hearing. We do not think that there was any error in this. The rule in chancery (and a mechanic's lien suit is a suit in chancery under our practice) undoubtedly is that depositions taken in a prior suit, where the parties and issues are substantially the same, may be used. Counsel have cited no authority, and we know of none, which would render such depositions taken at a prior hearing of the same suit incompetent.

It is suggested that there is a difference in this regard between depositions taken under a *dedimus* and those taken before a master on a general order of reference. We see no reason why there should be, and the only authority cited by

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counsel (Daniell's Chancery Practice) is to the contrary. Opportunity for cross-examination was given to and used by the appellants when these depositions were taken, and we see no injustice and nothing irregular in their use in the second hearing.

Objection is made to the allowance in the costs of the master's fees for the first hearing. We do not think that section 18 of the Act, as argued by appellants' counsel, prevents the exercise of the chancellor's discretion in a case like this. The appellants were ultimately "the losing party," and it was, in the opinion of the chancellor, "an equitable taxation of the costs of the proceedings," to include these fees in the decree against them. We do not think we should be justified in disturbing it.

The decree of the chancellor in the Circuit Court will be affirmed.

Affirmed.

Apollonia Warth, trading as Albin Warth, v. L. Loewenstein & Sons, a corporation.

Gen. No. 11,950.

1. **ROYALTIES**—*when obligation to pay, may be terminated.* Where a contract confers upon the licensee the right to return the patented article upon payment of royalties accrued at the time of such return, and thereby to terminate the obligation to pay future royalties, the licensee may by such action terminate such liability, notwithstanding the breach of a concurrent and collateral undertaking providing that in the event of making such a return, the licensee should not use any other like machine during the life of the patents under which it was constructed.

2. **INSTRUCTIONS**—*estoppel to complain of.* A party cannot complain of vices contained in instructions where such vices are likewise contained in instructions given by the court at his instance.

3. **WITNESS**—*competent to show unavoidable absence of.* It is competent for a party to show the unavoidable absence of a material witness not produced by him.

4. **EXHIBIT**—*when competent to permit jury to take.* It is competent to permit the jury to take with them upon retirement an exhibit, notwithstanding it may contain an immaterial memorandum which has by the ruling of the court been excluded.

5. **CONTRACT**—*when not in restraint of trade.* A royalty contract

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is not in restraint of trade by which the licensee agrees that in the event of his terminating his obligation to pay royalties as therein provided, he will not, for the life of the patents covering the machine which he is licensed to use, employ in his business any other like machine.

6. DEPOSITIONS—*when order suppressing, may be set aside.* Where the formal errors in the *jurat*, certificate, etc., which resulted in an order suppressing depositions, have been amended, it is proper to set aside the order suppressing the same.

7. COSTS—*when properly taxed against plaintiff.* The taxation of costs against the plaintiff is proper notwithstanding the issues were found for the plaintiff, where it appears that a tender of the amount found against the defendant was made and refused, even though such tender was not strictly formal but was objected to upon no other ground than insufficiency of amount.

Action of assumpsit. Appeal from the Circuit Court of Cook County; the Hon. CHARLES M. WALKER, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed May 29, 1905.

Statement by the Court. This is an appeal by the plaintiff below from a judgment of the Circuit Court in her favor against the appellee (which was defendant below) for \$87.50 damages, which judgment taxed the costs of the proceeding in that court against the plaintiff.

The judgment was rendered on the verdict of a jury. Inasmuch as the defendant admitted an indebtedness of \$87.50 to the plaintiff, the verdict was in effect, although not in form, a finding in favor of the defendant on the issues which were tried.

The appellant (plaintiff below) is a manufacturer of cloth-cutting machines, residing in Stapleton, New York; the appellee (the defendant below), a corporation manufacturing and selling men's clothing in Chicago.

The suit was brought in February, 1900. In April, 1902, an amended declaration was filed by the plaintiff (afterwards restored *nunc pro tunc* in March, 1904) containing four counts.

The first count alleged that in April, 1895, the plaintiff, at the request of the defendant, "licensed, let and delivered to use" to the defendant a patented cutting machine for cut-

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ting cloth, constructed under many described patents of the United States belonging to her, under "licenses, terms and conditions" which the count sets up in full. Said license is dated April 2, 1895, and is signed by "Albin Warth" (under which name the plaintiff was doing business), but not by L. Loewenstein & Sons. It purports for the consideration of \$600 and "upon the terms and conditions and payment of royalty as hereinafter set forth," to license L. Loewenstein & Sons to use in the business of clothing manufacturing the machine in question, "marked D, numbered 154, and of one and one-half inch cutting capacity."

The conditions, besides usual provisions in such licenses not in question here, are that the licensees shall pay the licensor the \$600 before mentioned on demand and semi-annual royalties of \$150 on the second days of October and April in each year, "until each of the patents herein named have run out." There is, however, in the license, the following condition:

"The said licensees may terminate the payment of royalty herein mentioned upon the condition that the aforesaid machine shall be returned and delivered to said licensor by the said licensees with payment of royalty up to the date of such return, and upon the further condition, and the said licensees agree that they will not thereafter use or authorize or allow to be used directly or indirectly in their business or elsewhere, any other cloth cutting machine until all the patents herein mentioned shall have run out."

The count, after setting out in *haec verba* the alleged license, declares that the defendant paid the three first semi-annual royalties becoming due respectively on October 2, 1895, April 2, 1896, and October 2, 1896, but did not pay those thereafter becoming due, "although the said defendant never did prior to the commencement of this suit, return the said machine with payments of royalties up to the date of such return. Whereby, etc., the plaintiff has suffered damage."

The second count alleges simply that in April, 1895, the plaintiff delivered to the defendant and licensed the defend-

ant to use a certain patented cutting machine known as D. No. 154, constructed under the patents numbered and dated as set out in the first count, from April 2, 1895, to the expiration of said patents, provided that the defendant made the payment of royalties and "upon the condition that the said machine should be returned and delivered to the plaintiff by the defendant with the payment of royalties up to the date of such return, and upon the further condition that it further agreed that it would not thereafter use or authorize or allow to be used directly or indirectly in their business or elsewhere any other cloth cutting machine until all the said patents should have run out and expired," and that in consideration of such delivery and license the defendant promised the plaintiff to take good care of the machine, and to pay to the plaintiff semi-annually royalties of \$150 on October 2 and April 2 in each year, but failed to pay the royalty due on April 2, 1897, and thereafter.

The third count is one in *indebitatus assumpsit*, "for the use and hire of a certain patented cutting machine, and for royalty on said machine for the use thereof."

The fourth count is an allegation that plaintiff let to the defendant for five years a certain patented cutting machine, and that defendant promised to pay the plaintiff what the use of it was reasonably worth, and that for said time the use and hire of the machine were reasonably worth \$1,000.

To this declaration the defendant pleaded the general issue, verified by affidavit, and also the Statute of Frauds, alleging in the latter plea that the supposed agreement of April 2, 1895, was not to be performed within one year from its date, and that no note of it in writing was signed by the defendant.

To the plea of the Statute of Frauds the plaintiff interposed a general and special demurrer, which demurrer was sustained by the court, the action of which in this regard is assigned in this court as a cross-error.

The plaintiff, during the pendency of the suit, took the depositions of Apollonia Warth, Henry Warth and Charles F. Warth. A motion was made by the defendant and

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granted by the court to suppress the same. Afterward the captions, jurats and certificates of the commissioner taking the said depositions having been amended, the order suppressing the depositions was vacated, and as amended they were restored to the files. To this action the defendant excepted. Charles F. Warth was produced by the plaintiff as a witness, and testified at the trial. The depositions of Apollonia Warth and Henry Warth were allowed by the court, over the objections of the defendant, to be read to the jury, and to this action of the court the defendant excepted, and it is assigned as a cross-error.

November 10, 1903, the cause was by stipulation and under the rules of court, in pursuance of such a stipulation, passed to be taken upon ten days' notice. In pursuance to notice provided for by said stipulation, the cause was placed on the trial calendar in March, 1904. A motion was made by the defendant to secure a continuance of said cause on account of the absence from the city and country for his health, as it was alleged, of Emanuel Loewenstein, the president of the defendant company, and claimed to be an important witness for it. This motion was denied by the court, and the cause was brought to trial before a jury on March 9, 1904, and the trial lasted for several days.

The bill of exceptions shows that counsel for plaintiff stated to the court, before the offer of evidence, that the plaintiff was not seeking to recover upon a written contract, but upon an unwritten contract.

The plaintiff introduced evidence in the deposition of Henry Warth of a conversation between the said Henry Warth, as agent for the plaintiff, and Emanuel Loewenstein, the president of the defendant corporation, on or before February 25, 1895, in which (Mr. Warth testified) Emanuel Loewenstein asked the terms for one of plaintiff's machines, and was told by Warth that he would put everything in writing and submit it. At that time defendant, which had taken over the business of a partnership of the same name, was using, under a written license executed by plaintiff and that partnership, one of plaintiff's machines known as No. 40 B.

cutting machine. Mr. Warth testified that in pursuance of the statement by him that "he would put everything in writing and submit it," he prepared in duplicate and delivered to Emanuel Loewenstein the following paper:

"Chicago, Feb. 25, 1895.

It is hereby agreed between Albin Warth, of Stapleton, New York, and L. Loewenstein & Sons, of Chicago, Ill., as follows, to-wit:

The said Warth is to furnish the said L. Loewenstein & Sons with one hundred and twenty feet of overhead track which has been formerly used by Messrs. Goldsmith & Stern of this city, and which said Warth is to erect over a set of three tables (so much thereof as necessary) with a new latest improved overhead carriage and cutting head of one and one-half inch cutting capacity (the said latest improved overhead carriage is furnished as an exchange of certain machine B. No. 46, formerly owned by Strauss, Yorndorf & Rose, and which said L. L. & Sons intended to purchase), for the sum of three hundred dollars (\$300) the said machine being subject to a semi-annual royalty of one hundred and fifty dollars (\$150) under the terms, conditions and provisions of a license to be the same form as their present form of license for a certain machine, B. No. 40, with the exception that said license is to contain the additional patents up to February 16, 1892.

It is also agreed in consideration of the foregoing to use so much of said overhead track, with one overhead carriage (being the carriage of machine B. No. 46 formerly used by Strauss, Yorndorf & Rose, as herein referred to), so as to operate their present machine, B. No. 40 (overhead) over a table not to exceed twenty-one (21) feet in length, and which said Warth is also to erect with necessary shafting for transmission of power from engine to said new machine, as well as to the present machine B. No. 40, arranged overhead as herein stated. The engine to be located and the necessary tables and linoleum to be furnished and put up in such man-

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ner as the said machines may require at the cost and charges of the said L. L. & Sons.

It is also agreed between the parties hereto, in the event should the said L. L. & Sons decide to and do return their present machine B. No. 40 (in order to terminate the royalty) within six months from date said new machine is put up, that they shall then only be released from payment of the royalty of said six months, with the privilege to extend said first six months, but should the machine B. No. 40 not be returned after the expiration of the first or second six months, the royalty will continue as if this understanding did not exist.

It is also further agreed should the said Warth complete further improvements which he has under contemplation of making, the said L. L. & Sons shall be entitled to same if they elect, without any cash consideration except that the royalty is to be extended for such additional patents therefor, but in no case shall the royalty exceed one hundred and fifty dollars semi-annually.

The said new machine is to be erected about April 1, 1895.

ALBIN WARTH,
Per Henry Warth."

Mr. Warth further testified that he and Mr. Loewenstein then went over this writing, and Loewenstein "said it would be all right, and I signed the same and he was going to sign it, too, and he said, 'Do you want me to sign it?' and I said, 'No, it is not necessary. After the machine is finished and erected then I will send you on the license paper in triplicate which will correspond with Exhibit No. 5, and you sign these written ones and return two to me,' and he said, 'All right, I will do that.'" By Exhibit No. 5 the witness evidently meant Exhibit No. 5 in the present case, which was the writing of February 25, above set forth in full. It does not appear otherwise than as quoted how the witness actually described it in his conversation, but he had testified that it was then before them.

"The present form of license for a certain machine B. No.

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40," referred to therein, is claimed by appellant to be shown by the license produced by them in evidence as plaintiff's Exhibit 4, made by "Albin Warth" to "Leopold Loewenstein, Emanuel Loewenstein and Sidney Loewenstein, copartners as L. Loewenstein & Sons." It is for the use of a cutting machine marked B. numbered 40, but is, otherwise than as to amount of consideration and payments, dates, the name of licensee and description of machine, exactly the same (above the signature of Albin Warth) as the instrument set up in the first count of the plaintiff's declaration and before described. It contains the same condition as that quoted in full in this statement from that instrument.

The witness Henry Warth further testified that thereafter he delivered to the defendant corporation "the machine, all the necessary running gear, and overhead tracks, shaftings and pulleys, and erected the machine in their place of business in Chicago" and left it there in working order.

September 17, 1895, Henry Warth, for the plaintiff, wrote to the defendant and enclosed what he termed in the letter a "license paper for cutting machine D No. 154, License No. 166 D" in triplicate, asking the defendant corporation to sign the same, retain one copy and return the others. He also enclosed the following bill:

"Stapleton, New York, Sept. 17, 1895.

Messrs. L. Loewenstein & Sons, Chicago, Ill.:

To Albin Warth, Dr.

Manufacturer and Inventor.

Albin Warth,
Zuschneidemaschinen.

Albin Warth,
Machines for Cutting
and
Folding Cloth.

Office and Factory, Stapleton, S. I., New York.

Mach. D. B.

Miscell. D. B.

Charged on Mach. & Miscel. Acc't. Order Received Feb. 25,
1895. Terms and Conditions, Dated Febr. 25, 1895.

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1895.	Quality.	Size.	No.
March 23.	1	D.	154
License No. 166 D. of Albin Warth's			
Patent Travelling			
Cloth'g Cutt'g Mach.			
Overhead Carriage			
Latest Improved			
Over-Head			
Aluminum Ma-			
chine One and			
half inch capa-			
city.			
with Sundries,			
Notch'g Mach. No.			
266, subject to a			
Semi-Annual royal-			
ty of \$150.00/100 as per			
subjoined License No.			
166 D, dated April			
2d, '95.			
			600.00
Allowance. The said machine being fur-			
nished in exchange of a certain machine			
B. No. 46 as per endorsement on above			
license			
			450.00 150.00
120 feet patented overhead double track			
with necessary iron frame work for sup-			
porting the same, formerly used by Mor-			
ris Goldsmith & Stern, painting and			
erecting same to operate over a length			
of three tables in connection with the			
above machine D No. 154, and over a			
length of one table with overhead car-			
riage of the said old machine B No. 46,			
so as to operate their present machine			
B No. 40 overhead.			
Also with necessary shaftings, pulleys and			
hangers for transmission of power from			
engine to said machines D No. 154 and			
B No. 40.....			
			150.00
The above 120 feet overhead double track,			
etc., etc., and the shaftings, etc., etc.,			
form and are part of the above machines			

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D. No. 154 and License No. 166 D.	
Net	300.00
Credit April, '95. Paid Hy. Warth on	
acc't.....	\$100.00
All claims must be paid on receipt of goods."	

A copy of the "license paper" was introduced in evidence as plaintiff's exhibit No. 8, and a copy of the bill as plaintiff's exhibit No. 7. Exhibit No. 8 is the instrument recited in the first count of the plaintiff's declaration before set forth. Immediately on receipt of the letter of September 17 with its enclosures, the defendant corporation wrote the following letter to the plaintiff:

"Chicago, Sept. 19, 1895.

Mr. Albin Warth, Stapleton, N. Y.

Dear Sir: We are in receipt of yours of the 17th with several inclosures. In reference to same, would say that we will not sign any such contract as you inclose. We are willing to keep your machine at the specified rental, but would not bind ourselves to the various restrictions contained within your printed form.

Trusting that you may arrange this to meet our views, we remain,

Yours truly,

L. LOEWENSTEIN & SONS."

To this plaintiff rejoined on September 21, asserting that the defendant had agreed to the terms contained in the license paper, and demanding that it be signed. The defendant answered, "We have not entered into any contract binding upon us. We will do what we proposed in our letter of the 19th, and no more. Should this not be satisfactory to you, the machine is here at your disposal, and you may remove the same whenever you see fit." Plaintiff replied, simply referring again to letter of September 21. Receiving no reply, plaintiff on November 6, 1895, sent to defendant another statement of account, showing a balance of \$200 due and drew for the same. The draft came back to plain-

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tiff unpaid, and November 29, the plaintiff drew again for \$200, and wrote a letter to defendant expressing the hope that the draft would be promptly paid. This draft was also returned unpaid, defendant writing that the failure to pay it was due to the "reasons that we put forth in our previous letters," which "we had hoped . . . would have fully explained the position."

Plaintiff then wrote to defendant the following letter:

"Stapleton, New York, December 10, 1895.
Messrs. L. Loewenstein & Sons, Chicago, Ill.

Gentlemen: Yours of the 3rd inst. received. The reason stated in your above mentioned letter for the purpose to evade your just obligations to which you have fully agreed, as per contract of Febr. 25, '95, which you hold in writing and under which the machine was furnished and erected.

I cannot take notice of any of your propositions following six months after carrying out of the agreement. I am entitled to the payment of the \$200.00 for which I have drawn upon you (being balance due on bill rendered Sept. 17, '95). I may state right here, should you not pay this bill at an early date I shall be obliged to use legal means for its collection, as I am much surprised to find a concern like yours to resort to such means as you do, to evade your just obligations.

Yours truly,

ALBIN WARTH,
per Henry Warth."

December 23, 1895, the defendant wrote plaintiff as follows:

"Mr. Albin Warth, Stapleton.

D. Sir: We inclose check for \$200.00 in payment of bill rend.

Yours truly,

L. LOEWENSTEIN & SONS."

To this, under date of December 26, 1895, the plaintiff

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replied, acknowledging "yours of 23rd inst." with check "in settlement of machine bill rendered September 17th, 1895."

(Note: When this letter was introduced in evidence by the plaintiff it bore a pencil memorandum of the defendant, "Favor of the 23rd inst. above referred to is our simple 'form' of remittance." Plaintiff having excluded this from the offer of the letter, defendant seems to have offered it. Objection was made to it by the plaintiff and the objection was sustained. The jury took to their room when they retired this exhibit, bearing the said pencil memorandum. This is one of the alleged errors assigned by the appellant.)

This letter inclosed a receipt for "machine & miscel. bill September 17, '95, for machine D No. 154, license No. 166 D New York."

It appeared in the evidence also that the plaintiff by her agents drew for \$150 on the defendant on October 2, 1895, April 2, 1896, and October 2, 1896, and notified defendant each time that the draft was "for semi-annual royalty due on your Albin Warth cutting machine, size D No. 154." Each draft was paid apparently on presentation. January 14, 1897, the defendant wrote the plaintiff the following letter, with inclosures as noted in the reply of the plaintiff next given:

"Chicago, January 14th, 1897.

Mr. Albin Warth, Stapleton, Staten Island, New York.

Dear Sir: We herewith hand you bill of lading for cutting machine 'D 154,' also check in full for rent to date. We have no further use for this machine.

Yours very truly,

L. LOEWENSTEIN & SONS."

To this the plaintiff replied:

"Stapleton, New York, January 21, 1897.

Messrs. L. Loewenstein & Sons, Market and Quincy Sts.,
Chicago, Ill.

Gentlemen: Your letter of the 14th inst. with your check

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for \$87.50 and bill of lading received in due course. In reply I beg to say that I cannot accept such check and bill of lading upon the conditions stated in your said letter. I therefore herewith return your check for \$87.50, dated Jan'y 14, '97, No. 2584, on the Mechanics' and Traders' Bank, New York City, and the B. & O. bill of lading, dated Jan'y 14, '97, for one (1) case hardware, weight 170 lbs. If you desire to terminate the payment of royalty on Machine 'D No. 154,' you can only do so under the terms and conditions of the contract of License No. 166 D, dated April 2d, 1895.

I desire to emphasize the condition that you must agree not to use another machine, from some one else, until all the patents referred to and mentioned in said contract of license shall have run out.

Your obligation to pay royalty continues.

ALBIN WARTH,
per Henry Warth."

There was apparently no further communication between plaintiff and defendant until October 3, 1898, when the plaintiff drew for \$600, which draft was returned unpaid with a note attached by defendant, "We do not owe him anything." Thereupon, on November 2, 1898, the plaintiff wrote defendant the following letter, which appears, so far as the record shows, to have closed the correspondence:

"Stapleton, New York, Nov. 2, 1898.

Messrs. L. Loewenstein & Sons, Market and Quincy Sts.,
Chicago, Ill.

Gentlemen: My draft No. 2598, dated October 3, 1898, for \$600, has been returned to me unpaid with a note attached written by you, which states, 'We do not owe him anything.' Signed, L. Loewenstein & Co. The said draft of \$600, which is for accrued royalty on your cutting machine D No. 154, license No. 166 D, dated April 2, 1895, ought to have been paid by you. The said machine is in your possession and has not been returned and delivered to me as provided for in the said contract of license, see in

particular the seventh clause thereof, which reads as follows: 'If you desire to terminate the payment of royalty on the said machine, it can only be done in accordance with the terms and conditions set forth in said contract of license.' Thus far the said machine has not been returned and delivered to me with the payment of the royalty up to date of such return. The longer you refuse to comply with the conditions of said license, the longer the royalty will continue to become due and payable up to such time that you see fit to do so. I think it very foolish on your part to refuse to comply with the terms and conditions of said contract, if you desire to terminate the payment of the royalty thereunder.

Yours truly,

ALBIN WARTH,
per Henry Warth."

In February, 1900, the present suit was begun by appellant, who claimed the semi-annual royalties of \$150 each up to the time of bringing the suit, with interest thereon, bringing up the aggregate amount claimed to be due to over \$1,150.

At the trial besides the depositions of Apollonia and Henry Warth, and documentary evidence including the letters in this statement described and repeated, the plaintiff introduced the testimony of Charles F. Warth, who testified that he was present when the box referred to in the bill of lading, dated January 14, 1897, was opened at Stapleton at the storage house, and that it contained Cutting Head D 154, the overhead carriage and some rail-end pulleys. He also testified that the "overhead track" is what the machine travels on, and "is one of the patents;" and that after the box containing the cutting heads, etc., was sent on to Stapleton, he saw in the defendant's cutting room a 120-foot patent overhead track "described in the bill of September, and belonging to the machine," and the counter shaft and hangers. He said also that the "notching machine" mentioned in the bill of September 17th, was a part of machine D 154, and that it was not returned "to his knowledge," and that at the time

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of this visit to the defendant's rooms he saw a cutting machine, not of the Albin Warth make—an electric machine—in operation. Over plaintiff's objection he was asked on cross-examination and required to answer whether his deposition was not taken and signed at the same time as that of his brother, Henry F. Warth.

The defendant offered as evidence the testimony of Doctor Schmid, a physician, that Emanuel Loewenstein was in bad health in 1903, and was advised by him to go away and remain away from Chicago; the testimony of Sidney Loewenstein, that his brother Emanuel, who alone had attended to the hiring of the Warth cutting machine, left Chicago November 13, 1903, on account of poor health, and was in Wies Baden, Germany; and the depositions of Michael Driscoll, who was in January, 1897, freight agent at Stapleton for the Staten Island Rapid Transit Co.; and of Edward C. Meurer, at that time in business at Stapleton, who, by their testimony showed that a case of hardware weighing 170 pounds, about 3 feet long, 2 wide, and 10 inches high, consigned by L. Loewenstein & Sons to Albin Warth, Stapleton, N. Y., was received by the Staten Island Rapid Transit Company, was refused by Henry Warth, and placed on March 26, 1897, at the storage rooms of Edward C. Meurer, in Stapleton, where it still remained, and where in February, 1902, Henry Warth and Charles Warth called and examined its markings and contents. They had about a year before called to know if there was such a case there for storage, and these were the only conversations had at any time by Meurer with any representative of the plaintiff.

During the defendant's case the appellee tendered \$87.50 in gold to appellant, which tender was declined by the appellant waiving "any technical point." Appellee's counsel then requested the court to make an order that the clerk should retain the \$87.50 in gold coin of the United States, which defendant deposited with him "for the sole purpose of paying the amount of the check" for that amount, sent by defendant to the plaintiff, but returned by her.

The court refused in their original form two instructions

offered by the plaintiff, and after modifying them gave them as modified. It gave five instructions offered by the defendant and refused fifteen.

After the jury had returned their verdict for \$87.50 in favor of the plaintiff, the plaintiff made a motion for a new trial, which was denied. A motion in arrest of judgment was also denied, and the judgment now appealed from was given. In this court the plaintiff has made fourteen assignments of error. Those argued, however, are only that the verdict and judgment were against the weight of and contrary to the evidence; that certain evidence was improperly admitted; that certain evidence was improperly excluded; that the jury were erroneously permitted to take an exhibit with a certain notation on it which was not in evidence, into the jury room, and that two of the instructions given for the defendant were erroneous.

HELMER, MOULTON & WHITMAN, for appellant.

NEWMAN, NORTHRUP, LEVINSON & BECKER, HARRY GOODMAN and C. E. CLEVELAND, for appellee.

MR. JUSTICE BROWN delivered the opinion of the court.

It would serve no good purpose for us to discuss at length all the interesting questions raised by the facts set forth in the statement prefixed to this opinion and argued in the elaborate briefs filed on each side of this controversy.

The jury found a verdict which was in favor of the defendant on the matters contested on the trial between the plaintiff and defendant, and we are not disposed to disturb the judgment founded on it.

On the main questions involved, we think that an oral contract for the use of machine D 154, with terms and conditions such as were embodied in the license from the plaintiff to the copartnership of L. Loewenstein & Sons, of machine B No. 40, may be assumed to be proved to have been made between the plaintiff and the defendant (the corporation L. Loewenstein & Sons), as claimed by the plaintiff,

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without rendering the verdict so clearly against the weight of the evidence that it must be interfered with by us.

The claim of appellee, as we understand it, is that no such contract was proved; that, on the contrary, the testimony of Henry Warth in connection with the correspondence introduced would have warranted the jury in finding that there was merely an agreement to sign a license contract in the future with terms which, to be binding, must receive such subsequent assent or signature of the parties, or that at best, if the oral agreement was more precise than this, and was to sign a specific license contract, such agreement was broken, and that it was only an action for such a breach, and not an action for royalties like the present, which accrued to the plaintiff.

We are of the opinion that the evidence offered by the plaintiff, showing, in addition to the statement of Mr. Warth, the fact that the defendant kept and used the machine after the contention of the plaintiff that it was bound by the terms of the proposed license agreement was plainly made known to it, and the further fact that it paid a bill according to its tenor, which set forth that contention, sufficiently established the existence of the contract that plaintiff claimed.

But we cannot agree with appellant as to its necessary legal effect.

The seventh clause of the license agreement provided that the licensees might terminate the payment of royalty therein mentioned, upon the condition that the machine should be returned and delivered to said licensor by the licensees with payment of royalty up to date of such return, and "upon the further condition and the said licensees agree that they will not thereafter use or authorize or allow to be used directly or indirectly in their business or elsewhere any other cloth cutting machine until the expiration of the Warth patents." It seems to us that the effect of this last quoted peculiar provision is to make a collateral agreement which went into immediate effect. Such we understand, too, to be the position as to the language used taken in the argument of this appeal by both parties. It did not require, they say, a

further agreement at the time of the return of the machine, but constituted by itself (if it was entered into and was valid) an agreement between the parties of the date at which it was agreed to. Assuming this, what is the legal result? Let it be supposed that on January 14, 1897, the defendant had beyond all dispute returned the entire machine D 154 and paid all royalties due to that date, and was not then using any other cutting machine of any kind or nature. Certainly until it did use such another cutting machine there would be no right of action for further royalties under the oral contract of February 25, 1895. The terms of that contract would have been complied with. But suppose that in December, 1907, just before the last Warth patent mentioned in the license expired, the defendant began to use an electric cutting machine. Doubtless plaintiff would then claim that under the agreement of February 25, 1895, an action had accrued to her for a breach of the contract made on that date, and she might perhaps with some plausibility claim (we express no opinion on the validity of such a claim) that the measure of damages for that breach was the aggregate of the royalties she had been deprived of during the intervening years. But could she sue directly under the agreement of February 25, 1895, for the royalties themselves for which from 1897 to 1907 she had had no claim whatever? If she could not (and we think she could not), then in this case the defendant could bring the claim for royalties to an end by a return of the machine with payment of royalties to the date of the return, leaving to the plaintiff her claim, if she had one, for damages for any breach of the collateral agreement to use no other cutting machine during the life of the Warth patents.

We are aware that language (purely *obiter dictum*) in the last paragraph of the opinion of the majority of the court in Warth v. Liebovitz, 179 New York, 200, might seem to militate against this view, but it does not change our confidence in its soundness. We think it would make no difference whether this collateral agreement was immediately broken at the time of returning the machine, or was thereafter

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broken, but it may be noted in the case at bar, that it does not appear when the defendant began to use the "electric machine" mentioned in the testimony of Charles F. Warth. It was certainly more than a year after the return of the Warth machine that Charles F. Warth saw it in operation.

The view we take, that the direct obligation to pay royalties could be terminated by the appellee by returning the machine with payment of the accrued royalty to date, would seem to have been taken by the trial judge and by both the plaintiff and defendant below, if we should judge by the instructions II, III and VII. Instruction II (unchanged in this regard) was requested by the plaintiff and despite appellant's ingenious argument to show that it does not state the same doctrine as the instruction III, which was requested by the defendant, we think its purport in the natural use of language is clearly the same.

Appellant complains of instruction III, but we do not see how she could effectively do so, even if it were erroneous, since, in our view, she propounded the same doctrine in instruction II. *Sibley Warehouse Co. v. Durand Co.*, 200 Ill., 354. But we do not think either II or III erroneous. We do not understand, however, why the defendant asked or the trial judge gave instruction VI. It is inconsistent with II and with III. It is more favorable, therefore, to the plaintiff than the theory she herself propounded in her offered instructions, and in our opinion, had it not been requested by the defendant, might have been objected to by it as erroneous and misleading. But it cannot be complained of by appellant.

Under this construction of the contract claimed by appellant to exist, the question to be left to the jury was whether the machine with the royalties due up to that time was at any time returned to her.

The appellee claims that it made such a return on January 14, 1897, and it is admitted that together with the attempted return on that date it paid the balance of the amount of royalties due under the contract at that time. Without discussing in detail the contentions and arguments made by

appellant and appellee in that regard, we will simply say that after a careful consideration of them, we are of opinion that it was a question properly to be left to the jury, whether the action of the appellee on January 14, 1897, was a compliance with the condition of the contract. There was a fair question under the alleged contract and correspondence, in connection with other evidence introduced by the appellant, whether the "machine" to be returned was not that which appellee forwarded to Stapleton, and whether the appellant did not in effect admit it to be such, by the objection which it made as to the "further agreement" demanded in her letter of January 21, 1897, and her omission, personally, or by her agents, before the suit was brought, to call particular attention to the non-return of that portion of the installed apparatus which she now claims was retained, although it had been observed by her agent to be still in place. The appellant, indeed, by her offered instruction II asked the court to submit this issue to the jury. We do not think that the evidence on this point is such that we can declare it to be clearly inconsistent with the verdict.

The appellant, besides her point on the weight of the evidence and her objections to the instructions III and VII, which we have disposed of, complains of other alleged errors in the trial.

She objects to the admission of evidence that Emanuel Loewenstein left Chicago for Europe before the trial and after the case had been passed on notice, on account of his health and under the advice of a physician, and in connection therewith also objects to instruction IV, as follows:

"The court instructs the jury that they should not draw any inference unfavorable to the defendant from the fact that Emanuel Loewenstein has not appeared as a witness in this case on behalf of the defendant, if from the evidence the jury believe that said Loewenstein is unavoidably absent in Europe at the time of this trial."

We do not think there was error in admitting the evidence or giving the instruction. The law is correctly stated in Jones on Evidence, sec. 17, and in Hope v. West Chicago St.

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R. R. Co., 82 Ill. App., 311, and Mantonya v. Reilly, 184 Ill., 183, that "The mere withholding or failing to produce evidence which under the circumstances would be expected to be produced, and which is available, gives rise to a presumption against a party." We think it was proper to allow the introduction of evidence tending to show why, under the circumstances, Emanuel Loewenstein's testimony might not be expected, and to leave it to the jury under the instruction complained of, to say whether he was "unavoidably absent," and to instruct them that if they so found they should not draw an unfavorable inference from the omission of his testimony.

Nor do we see anything injurious to the defendant in the questions which were allowed to be put to and answered by Charles H. Warth in relation to his deposition, or in the fact that the jury were allowed to take Exhibit 22 to the jury room with the pencil memorandum on it which had been excluded from the evidence. The memorandum was immaterial and could not have influenced the jury, who had the "favor of the 23rd" to which it referred before them. And so also was the notation on Exhibit 8, in our view, entirely immaterial. It could not have affected the verdict had it been admitted.

The question of costs has caused us some hesitation, but following the opinion of the Appellate Court for the Third District in Wagner v. Heckenkamp, 84 Ill. App., 323, we are inclined to think that a proper construction of Chapter 135 of the Revised Statutes justified the trial court, although the issues joined on the pleadings were found for the plaintiff, in taxing the costs against the plaintiff. Although in this case, as in that, evidence was lacking that the money was at all times pending the suit in the hands of the clerk of the Circuit Court, yet it does appear in this case, as in that, that the tender was made before suit, that no objection was made to its form, but it was declared as not sufficient in amount—that there was no evidence or suggestion that at any time the plaintiff desired to accept it, and that during the trial "the money was again tendered and refused, after

which it remained with the clerk until the trial was concluded and it still remained unaccepted." We therefore conclude that the judgment should be affirmed as it stands.

The view we take of the case relieves us from the necessity of any decisive consideration of the cross-errors assigned by the appellee, or of the proposition made by counsel that the seventh clause of the "license agreement" would be in any event void as against public policy. We will say, however, that we do not consider the error well assigned which complains of the admission of the depositions of Apollonia Warth and Henry Warth, nor do we think that the seventh clause of the license agreement could be adjudged void as in restraint of trade.

As to the demurrer to the plea of Statute of Frauds, we cannot agree with counsel for appellant that the fact that a corporation may be dissolved within a year brings this case within the reasoning of the opinions cited by them from the Massachusetts courts, where "the full performance of the agreement depended upon the contingency of the life of a party." *Peters v. Westborough*, 19 Pick. 364; *Doyle v. Dixon*, 97 Mass., 208. The opinion of Judge McAllister in *White v. Murtland*, 71 Ill., 250, adverts to the "nice distinction" made by the Supreme Court of Massachusetts between the facts in *Peters v. Westborough*, 19 Pick., 365, and those in *Hill v. Hooper*, 1 Gray, 131. We think the case at bar, under the theory of appellant as to the contract, comes rather within the rule laid down by the case of *Hill v. Hooper* than within that announced in *Peters v. Westborough*.

But it is not necessary for us to decide whether the demurrer was not in any event properly sustained upon other grounds. As the appellee himself admits, if the view that we take of the contract to pay royalties is a correct one, it was capable of performance within a year.

The judgment of the Circuit Court is affirmed.

Affirmed.

Touhy v. McCagg.

**Catherine C. Touhy, et al., v. Ezra B. McCagg,
Executor, et al.**

Gen. No. 11,279.

1. **MASTER'S FEES**—*when allowance of, proper.* The allowance by the court of a reasonable fee to a master for examining questions submitted to him and making report thereon, is proper.

2. **SOLICITOR'S FEE**—*when allowance of, in foreclosure proceeding, improper.* The allowance of a solicitor's fee in a foreclosure proceeding is improper where the trustee named in the trust deed, or a member of the law firm to which such trustee belongs, acts as the complainant's solicitor.

Foreclosure proceeding. Error to the Superior Court of Cook County; the Hon. AXEL CHYTRAUS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1904. Reversed and remanded. Opinion filed June 2, 1905.

Statement by the Court. Plaintiffs in error executed a trust deed in the nature of a mortgage to Arthur B. Wells, trustee, to secure their note for \$3,000. The trust deed contained a provision that in case of foreclosure the court should allow the complainant and tax as a part of the costs a solicitor's fee of not less than five per cent. of the face of the note and accrued interest. The holder of the note filed a bill to foreclose, to which the trustee was made a defendant, the bill alleging that he declined to file said bill of complaint. The bill was signed by John M. Blakeley as solicitor and counsel for complainant. The decree found that \$3,395.84 was due complainant and allowed complainant \$150 for solicitor's fees for the services of Mr. Blakeley in the proceeding, and allowed the master a fee of \$75 for examining questions submitted to him and reporting his conclusions thereon. To reverse this decree the grantors in the trust deed prosecute this writ of error.

WILLIAM R. CHAMBERLAIN, for plaintiffs in error.

JOHN M. BLAKELEY, for defendants in error.

MR. PRESIDING JUSTICE BAKER delivered the opinion of the court.

The contention that the court erred in allowing to the master a fee of \$75 for examining the questions submitted to him and reporting his conclusions thereon cannot be sustained. The order of reference directed the master to take and report the evidence with his conclusions thereon. The concluding portion of section 20, chapter 53, R. S., which relates to the fees of masters in the county of Cook, provides that "masters may receive for examining questions in issue referred to them and reporting conclusions thereon, such compensation as the court may deem just." The court under this provision of the statute was authorized to make the allowance that was made. *Schnadt v. Davis*, 185 Ill. 476.

The other errors assigned relate to and call in question the allowance by the court of \$150 for the solicitor's fees of complainant's solicitor. Mr. Blakeley, the solicitor of complainant, and Mr. Wells, the trustee in the trust deed which was foreclosed, were partners under the firm name of Wells and Blakeley. Mr. Wells testified that the attorneys' fees allowed in and by the decree would go to the complainant, but that the firm of Wells and Blakeley would make a charge to complainant for their services in the case and that the fees so charged when collected would go to Wells and Blakeley; that the attorneys' fees allowed by the decree would go to the complainant to reimburse him for the attorneys' fees paid by him. Mr. Blakeley testified that whatever the complainant paid for solicitors' fees in the foreclosure suit would be divided between Mr. Wells and himself.

It is well settled in this state that where a trustee in a trust deed acts as the solicitor of complainant in a bill to foreclose a trust deed, no allowance can be made in the decree for solicitors' fees. *Gray v. Robertson*, 174 Ill. 242; *Gantzer v. Schmeltz*, 206 ib. 560. The same rule applies where the solicitors for the complainant in such foreclosure suit are a firm of which the trustee is a member. *Collins v. Carey*, 2 Beavan, 128; 1 Perry on Trusts, 432.

In this case Mr. Blakeley was the solicitor of complainant and rendered the services in the case, but both members of the firm testified that his fees for such services would go into

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the partnership fund and that Mr. Wells, the trustee, would receive the same profit therefrom that he would receive if the services had been rendered by the firm. The master based his recommendation that the fee in question be allowed upon the ground that from such allowance "no profit flows to Mr. Wells from the trust estate. The profit comes to him, not by reason of any services performed by him but by reason of services performed by his partner." This position is not tenable. In the words of the Master of the Rolls in *Christopher v. White*, 10 Beavan, 523-525, "Would this court allow a trustee to say to his partner, 'You shall act as solicitor and earn all the profit you can for the concern'? I think that could not be maintained." It matters not whether Mr. Blakeley was employed by the complainant or by the trustee, nor whether the solicitors' fees allowed by the decree were thereby directed to be paid to complainant or to his solicitor. The services for which such allowance was made were rendered by Mr. Blakeley, and were so rendered, not for his own profit alone, but for the profit of the firm of Wells and Blakeley, of which the trustee in the trust deed under which the allowance was made was a member, and therefore the allowance for such services was improper. It was error to allow to complainant in this case a solicitor's fee of \$150 for services rendered by the partner of the trustee for the profit of the firm.

The decree of the Superior Court will be reversed and the cause remanded with directions to deny any allowance for solicitors' fees.

Reversed and remanded with directions.

**The Manufacturers' Exhibition Building Company v.
Joseph I. Landay.**

Gen. No. 11,762.

1. *BY-LAWS—power of stock-holders to adopt and repeal.* The statute which empowers directors to adopt by-laws does not divest the stock-holders of their inherent power to adopt and repeal the same.

2. *BY-LAWS—power of corporation to prescribe manner of amending.* A corporation cannot divest itself of the power to alter or amend its by-laws, but it can prescribe and fix the manner in which such by-laws should be amended and if the mode prescribed is reasonable, that mode must be followed.

3. *BY-LAW—when manner of amending, legal.* A by-law which provides that the by-laws adopted may be altered or amended by a majority vote of the stock-holders, or by a two-thirds vote of all of the directors, is valid.

Bill to set aside by-law, etc. Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1904. Affirmed. Opinion filed June 2, 1905.

Statement by the Court. Appellant corporation was organized in March, 1901, with a capital of \$6,000 in 120 shares of \$50 each. The stock was all subscribed by Joseph S. Meyer, Abram L. Sheppard and James A. Pugh, and at the first stockholders' meeting held March 11, 1901, they were chosen directors. At a meeting the directors held on the same day they adopted by-laws. Section 1 of Article 16 of the by-laws so adopted is as follows:

"These by-laws may be altered or amended at any meeting of the stockholders by a majority vote of the stock represented at such meeting, or by a two-thirds majority vote of the whole number of the board of directors at any regular meeting. Such action of the board of directors to be ratified and confirmed at the first meeting of the stockholders thereafter."

No money was paid by any of said subscribers for his stock, but the board of directors, composed of the three subscribers, by resolution declared the stock paid up by the services of the subscribers. At the first meeting of the directors,

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Meyer was chosen president, Sheppard vice-president and treasurer, and Pugh secretary, and the salary of each was fixed at \$3,000 per year. Sheppard sold his stock to the other subscribers and resigned his office in the corporation in June, 1901, and soon after the number of directors was increased to four, and the salary of the vice-president abolished. September 25, 1902, the stock of the corporation was held as follows: Joseph S. Meyer, 59 shares; Gussie W. Meyer, his wife, one share; James A. Pugh, 59 shares; Nellie Pugh, one share, and said four stockholders were the directors of the corporation. Joseph S. Meyer was president, Nellie Pugh vice-president, James A. Pugh secretary and treasurer.

Trouble arose between Meyer and Pugh, and September 25, 1902, the Pughs sold and transferred their 60 shares of stock in the corporation to appellee. Joseph S. Meyer took part in the negotiations for the sale of said shares of stock by Pugh to appellee, and before the agreement to purchase the same was made, agreed verbally with appellee that if he would buy said shares he should be made vice-president with a salary of \$250 per month up to January 1, 1903, and \$125 per month thereafter. James A. Pugh at once resigned his offices of secretary, treasurer and director, and Nellie Pugh her offices of vice-president and director. September 27, 1902, a special meeting of the stockholders of the corporation was held. The stock then stood on the books as follows: Joseph S. Meyer, 58 shares, Charles G. White and Gussie W. Meyer each one share, and appellee 60 shares. Appellee and White were elected to fill the vacancies in the board of directors. The stipulation of facts states:

“That at said meeting the following amendments to the by-laws were adopted: Article 17. First. The salary of the president of this corporation shall be three thousand (\$3,000) dollars per annum, payable in equal monthly installments. Second. That the salary of the vice-president of this corporation shall be as follows: For the months of October, November and December, 1902, and January, 1903, at the rate of Two hundred and Fifty (\$250) dollars per

month, and thereafter his salary shall be fifteen hundred (\$1,500) dollars per annum, payable in equal monthly installments. Third. No officer of said company other than those specified in sections one and two of this article shall be entitled to any compensation for services as an officer, and no salary in excess of the amounts therein specified."

February 9, 1903, the directors by vote of three in the affirmative against the negative vote of appellee adopted a resolution that the section of the by-law providing for a salary of the vice-president be repealed.

March 9, 1903, appellee was re-elected vice-president of the corporation and has since held that office and discharged its duties. Appellant refused to pay appellee his salary after March 9, 1903, and appellee declined to accept the salary offered from March 1 to March 9, and brought suit for his salary for the months of March and April and recovered judgment for \$250, from which judgment this appeal is prosecuted.

A. W. BRICKWOOD, for appellant.

No appearance for appellee.

MR. PRESIDING JUSTICE BAKER delivered the opinion of the court.

The real controversy in this case is between Joseph S. Meyer and appellee. September 25, 1902, Joseph S. Meyer and Gussie W. Meyer were two of the four directors of appellant and James A. and Nellie Pugh the other two. The Meyers held one-half of the capital stock, the Pughs the other half. Trouble arose between Meyer and Pugh, and Meyer suggested to appellee that he purchase of the Pughs the one-half of the capital stock held by them, and to induce him to make such purchase agreed with him that if he would do so he should be elected to an office in the corporation with a salary of \$1,500 per year. Appellee then purchased the stock of the Pughs and they resigned as officers and directors of appellant. This resignation left but two directors in the board of four. Possibly for the reason that

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the directors could take no action until the vacancies in the board were filled, and the stockholders could not fill such vacancies or take any action without the consent of both the Meyer party and appellant, the proceedings at the first meeting of the new stockholders, held September 27, 1902, were harmonious. Meyer transferred to White, an employe of appellant, one share of his stock, and White and appellee were elected directors. The four stockholders, who were also the four directors, at the same meeting unanimously adopted an amendment to the by-laws whereby the salary of the president was made \$3,000 per year and the salary of the vice-president \$250 per month up to January, 1903, and \$1,500 per year payable in equal monthly installments thereafter. The same persons who composed the stockholders' meeting, on the same day met as directors and elected appellee vice-president. After September 27, 1902, while appellee as the holder of one-half of the capital stock could prevent any action hostile to his interests by the stockholders of the corporation, he had but one vote in a board of four directors. The only protection he had against a repudiation by Joseph S. Meyer of his agreement with appellee was the by-law adopted at the first meeting of the directors of the corporation, which provided in effect that the by-laws of the corporation should not be altered or amended by the directors unless such action was ratified and confirmed by the stockholders at the first meeting of the stockholders held thereafter.

February 9, 1903, the directors by the votes of Joseph S. Meyer, Gussie W. Meyer, his wife, and White adopted a resolution that Article 17 of the by-laws adopted by the stockholders September 27, 1902, be amended by striking out the section which provided for the salary of the vice-president. This action of the directors was not ratified by the stockholders.

The contention of appellant is that the power to make by-laws is by the statute given to the directors; that the stockholders have no such power, and that therefore the by-law of March 11, 1901, is illegal and void and the resolution of

the board of directors of February 9, 1903, amending the by-laws was operative without any ratification by the stockholders. The second contention of appellant is that the by-law of September 27, 1902, providing for a salary for the vice-president "was void because made pursuant to a bargain with the majority stockholders and directors, and the vote and influence of appellee as owner of one-half of the capital stock."

It is to be noticed that the same by-law which provided for a salary of \$1,500 per year for the vice-president provided for a salary of \$3,000 per year for the president, and that that by-law was adopted, not by the directors, but by stockholders and was adopted at the same meeting at which by the vote of appellee, the holder of one-half of the stock, White and appellee were elected to fill the vacancies on the board of directors caused by the resignation of the Pughs when the other two directors were Joseph S. Meyer and Gussie W. Meyer, his wife.

Appellant while in law a corporation, is really little more than a partnership with limited liability: first between Meyer, Sheppard and Pugh, then between Meyer and Pugh, and after September 25, 1902, between Meyer and appellee, each owning one-half of the capital stock of the corporation. The corporation is prosperous. It has paid one dividend of forty per cent. Meyer testified that his half of the capital stock of the par value of \$3,000 was worth \$10,000, and that appellee's half of the stock was worth the same amount. Although they did not pay a dollar for their stock, the corporation paid at first to each of its three stockholders, who were also its officers and directors, a salary of \$3,000 per year and Meyer and Pugh were each paid their salary up to the time that Pugh sold his stock to appellee.

The agreement between Meyer and appellee was an agreement by Meyer, the owner of a half interest in appellant corporation, with appellee to induce appellee to buy of Pugh the other half interest in the corporation. It was only natural that the election of directors and officers and the salaries of the latter should be a matter of discussion and agreement

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between Meyer and appellee before such purchase was made. If appellee bought Pugh's stock and the Pughs resigned as officers and directors, Meyer and appellee must agree upon the persons to be elected directors or no director could be elected. Nellie Pugh was vice-president and James A. Pugh secretary and treasurer, with a salary of \$3,000 per year. It was important for appellee in determining whether he should buy Pugh's stock, to come to an understanding and agreement with Meyer, not only as to the persons to be chosen directors to fill the vacancies which would be caused by the resignation of the Pughs, but as well as to the persons to be chosen by the directors to fill the offices held by the Pughs and their salaries. Appellee might naturally hesitate to buy the stock and procure the resignation of the Pughs as directors and officers under an agreement with Meyer that appellee should be elected director, unless he and Meyer could agree in advance as to the person to be elected to fill the offices held by the Pughs and as to the salaries to be paid such new officers, for the other then directors could over appellee's head elect White and Mrs. Meyer to the offices held by the Pughs and the one selected to fill the office held by James A. Pugh would under the by-laws then in force be entitled to a salary of \$3,000 per year.

"The power of making by-laws is always said to be one of the essential incidents and rights of the corporation. This power exists at common law." Cook on Corporations, Sec. 4-a, p. 15.

Thompson on Corporations IV, sec. 5,314, says: "The body of stockholders in every business corporation are the persons who are incorporated. They are, in a substantial sense, the corporation. They are the ultimate constituency and the directors who are elected by them from their own number are their officers. The ideal body is, in theory of law, the principal, and the board of directors are the managing agents."

Our statute provides that the directors or managers of a corporation "may adopt by-laws for the government of the officers and affairs of the company." But this statute does

not divest the stockholders of the inherent power to adopt and repeal by-laws. *Lovell v. Westwood*, 2 Dow & Clark, 21.

The corporation could not divest itself of the power to alter or amend its by-laws, but it could prescribe and fix the manner in which the by-laws should be amended, and if the mode prescribed is reasonable, that mode must be followed. *Thibert v. Supreme Lodge*, 81 N. W., 223; *Mutual Aid Society v. Monti*, 59 N. J. Law, 341; *Mutual Fire, etc., v. Farquhar*, 86 Md., 671.

The directors of this corporation adopted a by-law which provided that a by-law might be altered or amended by a majority vote of the stockholders or by a two-thirds vote of all of the directors, provided such action of the directors be ratified or confirmed by the stockholders at their next meeting. The effect of this by-law was to divest the directors of the power to alter or amend a by-law without the consent of a majority of the stockholders. In this by-law we see nothing unlawful or unreasonable. It has never been repealed. It was in force when appellee purchased one-half of the stock of the corporation, and entered into and became a part of the contract between the corporation and the stockholders. The limitation of the powers of the directors to alter or amend the by-laws without the consent of the majority of the stockholders was a great safeguard to appellee, the holder of one-half of the stock, against hostile action by the directors, taken under pretense that the same was for the interest of the corporation, but in fact taken for the interest and profit of the owner of the other half of the stock. There is in this corporation no minority stockholder to complain of the agreement between Joseph S. Meyer and appellee. It is only Meyer who is benefited and appellee who is injured by Meyer's repudiation of his agreement, and only Meyer who would suffer and appellee who would profit by the keeping of that agreement. No consideration of public policy or regard for the interest of others required Meyer to repudiate his agreement. On the contrary the motives of common honesty, every motive which can influence a man to keep his word and deal fairly, required him to keep that agreement.

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The by-law adopted by the stockholders September 27, 1902, providing for a salary of \$125 per month for the vice-president, has not been repealed in the manner prescribed by the by-laws of the corporation and must therefore be held to remain in force and appellee held entitled to the salary by that by-law provided for the office which he held.

The judgment of the Superior Court will be affirmed.

Affirmed.

**Vaclav Benes v. The People of the State of Illinois,
ex rel. Frantiska Katuk.**

Gen. No. 11,787.

1. **BASTARDY**—*presence of child at prosecution for, not error.* It is not error to permit the prosecutrix to bring with her into the court room and to take with her to the stand the alleged bastard child, where it is too young to be left alone and no one is provided to take charge of it.

2. **EXCLUSION OF EVIDENCE**—*when not ground for complaint.* Where a party does not move for a continuance nor present an affidavit stating the evidence which he expects would be given by an absent witness, but merely states what he expects to prove by such absent witness, the exclusion of such offer by the court is not ground for complaint.

Prosecution for bastardy. Appeal from the Criminal Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1904. Affirmed. Opinion filed June 2, 1905.

FANNING & HERDLICKA, for appellant.

No appearance for appellee.

MR. PRESIDING JUSTICE BAKER delivered the opinion of the court.

On the trial of an issue of bastardy the relatrix was called and sworn as a witness, whereupon the following occurred:

"Counsel for defendant: Is this the alleged child that the witness has in her arms?"

"Counsel for state: That is the child.

"Counsel for defendant: Then I object to the production of the child on the witness stand.

"The Court: If you wish to furnish a nurse to take care of it, you can do so, otherwise the objection is overruled."

This ruling was excepted to and is here assigned for error.

The child was eight months old at the time of the trial. The mother was a necessary witness. It does not appear that she had any friend present to take care of the child while she was on the witness stand and it was too young to be left alone.

In *Robnett v. The People*, 16 Ill. App., 299, the plaintiff was allowed to make profert of the child or introduce it in evidence against the defendant over his objections. Here it was the defendant who first asked whether the child which the relatrix held in her arms was the child alleged to be a bastard. To hold that it was error to permit the relatrix to take her child with her when she went upon the witness stand, would be to hold that in a bastardy case the relatrix may not bring with her to the trial and into the presence of the jury her alleged bastard child. Whatever inferences the jury might draw from the fact that the relatrix carried a child with her upon the witness stand, they would draw if the relatrix with a child in her arms sat at the side of the state's attorney during the trial and committed such child to the care of some person when she was called to the stand.

The record shows that during the trial an attachment was issued for a certain witness; that afterwards counsel for defendant stated what he expected to prove by said witness; that plaintiff's counsel objected to such offer of proof and the court sustained the objection, and this ruling is also assigned for error. The defendant did not move for a continuance because of the unauthorized departure of a witness who had been in attendance at the trial and support his motion by affidavit stating the facts as to the absence of the witness and the facts the defendant expected to prove by such witness, but without such motion or affidavit stated what he

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expected to prove by the witness and the court properly held such evidence not admissible.

We find no error in the rulings of the court on the instructions and the verdict cannot be said to be against the evidence.

The judgment of the Criminal Court will be affirmed.

Affirmed.

Kate Levine v. Michael T. Carroll.

Gen. No. 11,808.

1. **WITNESS**—*when husband competent as, for wife.* Where the litigation concerns the separate property of the wife, the husband is a competent witness in her behalf.

2. **WITNESS**—*when transcript of evidence of deceased, competent.* The evidence given by a deceased witness is competent where the issues in the former trial were substantially the same as those in which the testimony is offered.

3. **CROSS-EXAMINATION**—*when answer given upon, not binding upon cross-examiner.* While the cross-examiner is bound by the answer of a witness given on cross-examination with respect to a collateral matter, yet such rule does not apply if the collateral matter brought out upon the cross-examination was proper in view of the nature of the direct testimony given by the witness.

4. **DEED**—*legal effect of, cannot be shown by parol.* Oral testimony is not admissible to limit the legal effect of a deed.

5. **DEED**—*consideration of, may be shown by parol.* The true consideration of a deed may be shown by parol evidence.

6. **EASEMENT**—*how cannot be extinguished.* An easement created by deed cannot be extinguished by an unexecuted parol agreement.

Action commenced before justice of the peace. Appeal from the Circuit Court of Cook County; the Hon. CHARLES M. WALKER, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1904. Reversed and remanded. Opinion filed June 2, 1905.

Statement by the Court. Prior to March 3, 1897, Solomon Levine was the owner of lots 1 and 2 in a certain subdivision. On that day he conveyed lot 1 to appellee by a warranty deed. March 11, 1897, he conveyed lot 2 to his daughter, who on the same day conveyed the same to appel-

lant, then the wife of Solomon Levine. Solomon Levine built upon lot 1 two buildings. The building on the rear of that lot extended over the lot line, so that at the ground three inches of the building rested on lot 2. The second story of said building projected beyond the lower story so that the second story overhung lot 2 nearly three feet.

The contention of appellant is that as a part of the verbal agreement between Solomon Levine and Carroll for the purchase and sale of lot 1, Carroll agreed to pay rent at the rate of five dollars per month, for the use and occupation of that part of lot 2 upon which the building on lot 1 encroached, until he should move said building so that it would no longer encroach on lot 2. Appellee denies that such an agreement was made. Appellant brought an action before a justice of the peace against Carroll to recover the rent claimed to be due under such agreement. The case was taken to the Circuit Court by appeal and the trial in that court resulted in a judgment for the defendant from which the plaintiff prosecutes this appeal.

MOSES, ROSENTHAL & KENNEDY, for appellant.

MCARDLE & MCARDLE, for appellee.

MR. PRESIDING JUSTICE BAKER delivered the opinion of the court.

The errors assigned by appellant only call in question the rulings of the court on the admission and exclusion of evidence.

In November, 1900, a forcible detainer suit, brought by appellant against appellee to recover possession of that part of lot 2 upon which the building on lot 1 encroached, was tried before a justice. Solomon Levine died after the trial of the forcible detainer suit and before the trial of this suit. At the trial in this case the plaintiff offered in evidence a transcript of the report of the testimony of Solomon Levine at the trial of the forcible detainer suit, taken by a stenographer. The stenographer was called as a witness, and the plaintiff offered to prove by him that he took the testimony

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of Solomon Levine and that the transcript offered in evidence was a full, true and correct transcript of the testimony of Solomon Levine at that trial. The defendant objected, upon the ground that the testimony was taken, not in the case on trial, but in another case; that such trial was before a justice of the peace and for that reason the evidence was not admissible, and upon the further ground that Solomon Levine was the husband of the plaintiff and, if living, could not testify for her, and the court sustained the objection and excluded the evidence.

The litigation concerned the separate property of the wife and the husband, if living, would have been a competent witness for the wife. R. S., sec. 5, chap. 51; *Cassem v. Heustis*, 201 Ill., 208-235.

The issues in the forcible detainer suit and in this suit were substantially the same and evidence as to the testimony of a deceased witness given at the trial of that suit was competent in this suit. *McConnel v. Smith*, 27 Ill., 234; *Pratt v. Kendig*, 128 Ill., 303.

The plaintiff offered to prove by the stenographer who was called and sworn as a witness the facts necessary to make the transcript offered in evidence admissible under the rule stated in *Brown v. Luehrs*, 79 Ill., 575, followed and approved in *Luetgert v. Volker*, 153 Ill., 385, and the objection to the transcript was not because the preliminary proof had not been made but was to the evidence offered of the testimony of Levine at the trial of the other case. We think the court erred in sustaining the objection of the defendant to this evidence.

The testimony on both sides was that in March, 1897, a short time after Levine sold lot 1 to Carroll, Carroll paid Levine \$10. The testimony for plaintiff tended to show that this payment was made for two months' rent under the agreement as claimed by plaintiff. That for the defendant, that at the time such payment was made another and different agreement was made between Levine and Carroll and that \$10 was paid under the agreement then made.

Anschwitz, a witness for defendant, testified in chief that

he lived in Levine's house on lot 2 in 1897; that he remembered the sale of lot 1, that it was in March or February; that shortly after the sale he heard a conversation between Levine and Carroll in Levine's yard; that he started to go to work, had his overalls under his arm, but waited and heard the conversation, heard Carroll offer Levine \$10 for the use of his yard for his tenants, that Levine said all right and that he saw Carroll hand Levine money. On cross-examination the witness testified that he moved into Levine's house in the fall of 1896, that he lived there in the spring of 1897. In rebuttal plaintiff testified that Auschwitz did not move into Levine's house until the end of June, 1897, but the court struck out her testimony and sustained the objection of defendant to plaintiff's offer to prove by two other witnesses that Auschwitz was not living in the Levine house in March, 1897, when he claimed to have heard the conversation he testified to, and did not go there to live and was not known to any of the parties until June, 1897. It is insisted that the ruling was proper because the place of residence of the witness at the time was immaterial, and the fact that he then lived in Levine's house was a collateral fact brought out by the plaintiff on cross-examination, and therefore the plaintiff could not impeach the witness by contradicting him as to such fact. No rule of evidence is better settled than that a party may not on cross-examination prove a collateral and immaterial fact and then give evidence to contradict the witness as to such fact for the purpose of impeaching him. But in this case, while the witness did not in his examination in chief state in words that he was living in Levine's house in March, 1897, when he heard the conversation between Levine and Carroll, that inference might fairly be drawn from his testimony in chief. The place of residence of the witness was not new matter brought out for the first time on cross-examination by the plaintiff, but such cross-examination as to the place of residence of the witness was proper cross-examination upon the facts stated by him on his examination in chief, as to his residence at the time he testified that he heard the conversation. The witness was asked in chief after

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he had testified that he lived in Levine's house in 1897 and heard the conversation in Levine's yard in March, 1897: "How did you happen to hear that conversation?" In answer he testified to an occurrence that he said happened an hour before the conversation, and then testified about going to work with his overalls on his arm as above stated.

In case of *Artz v. Railway Co.*, 44 Iowa, 284, it was said, p. 286: "The defendant introduced into the evidence the subject of the witness offering religious consolation to plaintiff, and upon his cross-examination he was asked, and responded, without objection, as to his refusal to pray for plaintiff, upon his request. This was clearly a continuation of the subject introduced by defendant, and objection cannot now be raised by the same party to the competency of the evidence. Neither can the defendant, having introduced the subject and drawn out the evidence, now object to the contradiction thereto offered by plaintiff."

In *East Tenn. Ry. Co. v. Daniel*, 91 Ga., 768, it was held that "Where a witness by way of accounting for his presence at the scene of the killing of an animal stated that immediately before going there, he made particular purchase at a certain store, evidence is admissible in behalf of the opposite party, showing or tending to show that he made no such purchase on the occasion referred to. While this fact is not directly material on the circumstances of the killing, it is indirectly material because it contradicts the witness as to the train of events which led him to be present, and thus tends to discredit him as to the fact of his presence." See also *People v. Freeman*, 28 Pac. (Cal.), 261; *Golson v. State*, 26 Southern (Ala.), 975; *Sitterly v. Gregg*, 90 N. Y., 686; *Davis v. Cal. Powder Works*, 84 Cal., 617; *C. C. R. R. Co. v. Allen*, 169 Ill., 287.

The testimony of Auschwitz that he lived in Levine's house when he heard the conversation between Levine and Carroll in February or March, 1897, was given on his examination in chief to explain how it happened that he was where he could hear that conversation which he said occurred in Levine's yard. It was therefore not collateral and the tes-

timony of appellant which was stricken out and that of the witness which was excluded tended to contradict the witness upon a material matter and therefore to impeach him and should have been admitted.

The contention of appellee that the deed of Levine to Carroll carried with it an easement in lot 2 for the support of the building on lot 1, so long as that building shall be maintained, seems to be supported by the authorities and for the purposes of this agreement may be admitted. *Wilson v. Wightman*, 55 N. Y. Supp., 806; *Ingals v. Plamondon*, 75 Ill., 118; *Clark v. Gaffeney*, 116 ib., 362.

It is elementary that oral testimony is not admissible to limit the legal effect of a deed and that an easement created by deed cannot be extinguished by an unexecuted parol agreement. But the contention of appellee that from these rules of law the conclusion follows that there could be no recovery in this case and therefore the rulings of the court on the admission or exclusion of evidence were not harmful to appellant, cannot be maintained. The contract for the sale of the lot was made before the deed, not in or by the deed. So far as appears that contract was verbal and oral evidence that as a part of the consideration Carroll agreed to pay Levine \$5 per month for the easement in lot 2, created by the deed, so long as he should use and enjoy that easement was admissible. *Ludeke v. Sutherland*, 87 Ill., 481; *Lloyd v. Sandusky*, 203 ib., 621; *Brosseau v. Lowy*, 209 ib., 405; *Collins v. Tillou*, 26 Conn., 368; *Greedy v. McGee*, 55 Ia., 759.

In the case last cited the court say: "It is urged that evidence in relation to boarding is inadmissible, because it adds to or varies the written contract. The contract is wholly in parol. The conveyance is not the contract. It is the evidence of the consummation of some contract, but is not evidence of what the contract was."

For the errors indicated the judgment of the Circuit Court will be reversed and the cause remanded.

Reversed and remanded.

Bortree v. Macon.

Maurice R. Bortree v. Mary F. Macon.**Gen. No. 11,804.**

1. **FORECLOSURE**—*when decree in, erroneous.* A decree entered for the foreclosure of a second trust deed is erroneous which provides that the defendants be barred and foreclosed from all equity of redemption in case of the sale of the mortgaged premises; the decree should provide for sale subject to the encumbrance created by the prior trust deed.

2. **SOLICITOR'S FEE**—*when allowance of, erroneous.* The allowance of a solicitor's fee upon overruling a demurrer is erroneous and unauthorized by statute.

3. **COSTS**—*what are not, within meaning of statutes.* Solicitor's fees do not come within the statutory definition of costs.

Foreclosure proceeding. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTTILL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1904. Reversed and remanded. Opinion filed June 2, 1905.

Statement by the Court. Appellee filed a bill in the Circuit Court against Maurice R. Bortree and Sam. R. Hurford to foreclose a trust deed in the nature of a mortgage executed by Bortree to secure his promissory note for \$500, dated September 16, 1900, payable five months after date, "with interest thereon at the rate of six per cent per annum, payable annually." It is further stated in the note that the same is secured by a trust deed on real estate "and is to bear interest at the rate of six per cent per annum after maturity." The trust deed was recorded September 16, 1900.

Hurford in his answer to the bill set up that he was the trustee in a prior trust deed recorded July 30, 1887, given by Bortree to secure his note for \$1,350, upon which \$1,500 was due. Bortree demurred to the bill. The court overruled his demurrer as frivolous and filed for delay only and ordered "that an additional fee of twenty-five dollars to that stipulated in said mortgage be taxed against the defendant Bortree and that the master shall so tax the same," and referred the cause to a master to take and report proofs, etc. The master in his report found that there was due on the

mortgage note \$540, to which was added a solicitor's fee of \$50 as provided in the trust deed, and \$25 the additional solicitor's fee ordered to be taxed by the court, making a total of \$615. He also found the amount due on the Hurford trust deed and that said deed was recorded August 1, 1887.

Bortree filed objections to the finding as to the \$25 additional solicitor's fees and as to the finding of the amount due complainant, which were overruled by the master. Upon the coming in of the report it was ordered that said objections stand as exceptions before the court and the same were overruled. The court in the decree allowed complainant the solicitor's fee of \$50 and "the further sum of \$25 additional attorney's fee taxed by the court," found the amount due complainant and decreed that unless the same was paid by the "defendants Bortree and Hurford or some of them," said mortgaged premises be sold, etc., "And the defendants in this cause and all persons claiming under them or either of them shall be forever barred and foreclosed from all equity of redemption and claim of, in and to said premises," etc.

From this decree this appeal is prosecuted.

F. S. BAIRD, for appellant.

HAMMOND & MACON, for appellee.

MR. PRESIDING JUSTICE BAKER delivered the opinion of the court.

The decree that the defendant Hurford be barred and foreclosed from all equity of redemption, etc., in case of a sale of the mortgaged premises under the decree in favor of complainant was erroneous. The decree should have provided for a sale subject to the encumbrance created by the prior trust deed in which Hurford was trustee. *Hibernian Bank- ing Ass'n v. Law*, 88 Ill. App., 18.

The order that a solicitor's fee be taxed against the defendant Bortree upon the overruling of his demurrer to the bill was unauthorized and erroneous.

Section 10, Chapter 33 R. S., provides that "If in any

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action judgment upon any demurrer, by either party to the action, shall be given against the plaintiff or demandant, the defendant shall recover costs against the plaintiff or demandant. If such judgment be given for the plaintiff or demandant, he shall recover costs against the defendant, and the person so recovering costs shall have execution for the same." Section 18 of the same chapter provides that in all cases in chancery except when the complainant dismisses his bill or the same is dismissed for want of prosecution, if not otherwise directed by law, "it shall be in the discretion of the court to award costs or not." But these statutes do not give to the court power or authority to allow and tax an attorney's fee as costs except when the statute provides that it may be done.

In *Constant v. Matteson*, 22 Ill., 546, which was a bill to foreclose a chattel mortgage, Mr. Justice Walker said (p. 560): "The court below erred in allowing Matteson a solicitor's fee to be taxed on the fund as costs in the case. The statute regulating fees of officers provides for no such fee as that of an attorney or solicitor; and the court must in taxing and allowing costs look to the statute as its warrant of authority. While the Court of Equity has a discretion in awarding costs in Chancery causes, it must confine that discretion to the fees allowed by the statute."

It was held in *Conwell v. McCowan*, 53 Ill., 363, error to allow a solicitor's fee in a proceeding to foreclose a mortgage on real estate, on the ground that it was not a statutory fee or charge. In *Campbell v. Campbell*, 63 Ill., 502, it was held error to allow a solicitor's fee in a partition suit when the decree was entered prior to the statute of 1869, which provides for solicitors' fees in such cases.

In *Cooper v. McNeil*, 9 Ill., App., 97, which was a bill for an account of partnership transactions it was said (p. 99): "It was error for the court to give an attorney's fee. No statute authorizes such a fee. The discretion of a court of equity in awarding costs must be confined to the fees allowed by statute."

The court properly held that the note in question bore interest from date, not from maturity. A note bearing "in-

terest at the rate of six per cent per annum" bears interest from date. *Mobley v. Darega*, 16 S. C. 73, 42 Amer. Rep., 632.

The decree of the Circuit Court will be reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

Reversed and remanded with directions.

City of Chicago v. L. Reinschreiber.

Gen. No. 11,776.

1. MUNICIPAL CORPORATION—*source of powers of*. A municipal corporation possesses such powers as are conferred by statute.

2. ORDINANCE—*reasonableness not test of validity of*. The mere fact that an ordinance is reasonable does not determine its validity; there must appear authority for its enactment.

3. "JUNK STORE"—*what is not, within meaning of statute authorizing licensing of*. A store where bottles, new and old, are exclusively dealt in, is not a junk store within the meaning of such statute, merely because bottles which have been used, but are as good as ever, in no way distinguishable as bottles, so far as appears, from such as are new, are bought and sold there in the ordinary course of business, together with bottles which are absolutely new.

4. "SECOND-HAND STORE"—*what not, within meaning of statute authorizing licensing of*. A store such as is defined in the preceding paragraph of syllabus is not a second-hand store within the meaning of such statute.

5. COSTS—*judgment against municipal corporation for, improper*. It is error to enter a judgment for costs against a municipal corporation.

Action commenced before justice of the peace. Appeal from the Criminal Court of Cook County; the Hon. RICHARD S. TUTTILL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1904. Reversed and remanded. Opinion filed June 2, 1905.

Statement by the Court. This action was commenced before a justice of the peace, where judgment was rendered fining appellee \$10 and costs for doing business without a license in alleged violation of section 1783 of the ordinances

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of the city of Chicago. Upon appeal to the Criminal Court—a jury having been waived—appellee was found not guilty. The city brings the cause here upon appeal.

The case was submitted upon an agreed statement of facts, as follows:

“L. Reinschreiber, the defendant herein, was on the 20th day of April, A. D. 1903, prior to the commencement of this action, engaged, at No. 2333 State street, in the city of Chicago, county of Cook and State of Illinois, in the business of dealing exclusively in new and second-hand bottles; that his business consisted in the purchase and sale of new and second-hand bottles in about equal amounts; that the defendant, through his agents and employes, bought from any person desiring to sell to him old bottles, and through his agents and employes gathered up in the streets and alleys of the city of Chicago second-hand and old bottles, and that the entire amount of old bottles handled in the defendant's business did not exceed one-half of the business done by defendant; the other one-half consisted in dealing in new bottles. That the defendant bought and sold old bottles without reference to the prior use to which said bottles had been put or devoted, and that the defendant held himself out to the public as a bottle dealer dealing in new and second-hand bottles; that is, in the purchase and sale of new and second-hand bottles; that some of the purchases of new and old bottles by defendant were made in carload lots, and that the business of the defendant in buying and selling new and second-hand bottles was conducted in the city of Chicago; that the fee for a license as a second-hand dealer is fixed by the ordinances of said city at \$50 per annum, and that the defendant had no license of any kind whatsoever from the city of Chicago for the conduct of his business; that the following ordinance of the city of Chicago (entitled second-hand dealers) was duly passed and published and was on the 20th day of April, A. D. 1903, in full force and effect:

“Section I, paragraph 1783, Article I, Chapter 59 of the Revised Code of the City of Chicago, passed April 8, 1897,

be and the same is hereby amended so that said paragraph shall read as follows:

“1783. *Dealing without license prohibited.* No person shall keep a place for the purchase or sale of second-hand clothing, second-hand household goods, bottles or other articles, nor shall any person trade, barter, deal in or carry on the business of dealing in second-hand bottles, second-hand household goods, or other articles without being specially licensed for such purpose, and any license issued under the provisions of this ordinance shall designate the house or place in which the person so licensed shall carry on the business for which he is licensed, and such business shall not be carried on or conducted in any other place than that designated in and by said license. No person licensed under the provisions of this section shall be permitted to solicit business in any of the articles named herein upon any street or public highway in the city of Chicago without being specially licensed for said purpose. Any person violating the provisions of this paragraph shall upon conviction thereof be fined not less than \$50 nor more than \$200 for each offense. This ordinance shall take effect and be in force from and after its passage and due publication.”

“All of which above facts were agreed upon in open court by the parties hereto as facts proven and admitted in the above entitled cause by competent evidence.”

HOWARD S. TAYLOR and GEORGE H. KRIETE, for appellant.

ELIJAH N. ZOLINE, for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

Appellant contends that the ordinance in controversy is valid and reasonable, that it is applicable to appellee's business, and that the proof showed the latter guilty of its violation.

It is conceded that appellee is engaged in buying and selling new and second-hand bottles in about equal quantities,

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that he buys from any one who desires to sell old bottles to him, that by his agents and employes he gathers second-hand and old bottles in the streets and alleys of Chicago, that he buys and sells them without reference to their prior use, and buys both new and second-hand bottles sometimes in earload lots. The ordinance specifically forbids any one "to deal in or carry on the business of dealing in second-hand bottles," or to "keep a place for the purchase or sale of second-hand * * bottles" without being specially licensed, a violation of the ordinance subjecting the offender upon conviction to a fine not less than \$50 nor more than \$200.

Article 5 of the Act providing for the incorporation of Cities and Villages (R. S., Chap. 24) confers authority upon the city council in cities and upon the president and board of trustees in villages (paragraph 4) to fix the amount, terms and manner of issuing and revoking licenses; (par. 66) "to regulate the police of the city or village, and pass and enforce all necessary police ordinances;" (par. 78) "to do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease;" (par. 95) "to tax, license and regulate second-hand and junk stores and to forbid their purchasing or receiving from minors without the written consent of their parents," etc., and (par. 96) "to pass all ordinances, rules and make all regulations proper or necessary to carry into effect the powers" so granted. These are the provisions relied upon by the city as authorizing the ordinance in controversy.

A municipal corporation possesses such powers as are conferred by the statute. Unless authority can there be found for the ordinance under consideration it must be deemed invalid. *Stanton v. City of Chicago*, 154 Ill., 23-27. There is nothing in the evidence tending to show that so far as second-hand bottles are concerned the ordinance can be justified as a necessary police ordinance or as necessary for promotion of health or suppression of disease. The power must be found if at all in the provision authorizing the city council to "tax, license and regulate second-hand and junk stores." While it is true, as said in *Harmon v. City of Chicago*, 140

Ill., 374-396, that the presumption is always in favor of the validity of an ordinance passed in pursuance of competent statutory authority, such authority is not itself a matter of presumption, and it is immaterial how reasonable an ordinance may be if the authority for its enactment has not been conferred.

The question is then whether the business of appellee is such as to bring it and the place where it is conducted within the definition of "second-hand and junk stores." A junk store is a place where "junk" is dealt in. Junk is defined as "worn out and discarded material in general that may be turned to some use; especially old rope, chain, iron, copper, parts of machinery, and bottles gathered or bought up by tradesmen called junk dealers; hence, rubbish of any kind; odds and ends" (Century Dictionary). The evidence shows that appellee's business cannot be properly described as that of a junk dealer. He buys old bottles, to be sure, as well as new, but he deals in nothing else. He is not a buyer or seller of old and worn out or miscellaneous materials. Old bottles, as fit for use as when new, may be found in junk shops, but are not by themselves properly definable as "junk," nor can persons who deal in them exclusively properly be called "junk dealers." Bottles do not generally wear out and are capable of use unless broken, in precisely the same manner as new bottles. They are less properly described as "junk" than old iron or copper or brass, which are sold to foundries to be re-melted. Yet a foundry buying up old iron for such purpose could scarcely be deemed a junk shop. In *Carberry v. United States*, 116 Fed. Rep., 773-774, it was held that "old bottles capable of being used as bottles are not junk and are properly assessable as bottles." In *City of Duluth v. Bloom*, 55 Minn., 97-100, it is said that "Every junk shop is a second-hand store, but not every second-hand store is a junk shop. * * * The word 'junk,' which is of nautical origin, originally meant old or condemned cable and cordage cut into small pieces, which when untwisted were used for various purposes on the ship. Hence the word afterward came to mean worn out or discarded material in general, that

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still may be turned to some use, especially old rope, chain, iron, copper, parts of machinery, bottles, etc., gathered or bought up by persons called 'junk dealers.' " Although old bottles are not necessarily "junk," yet, if they were, one who buys and sells them only would not necessarily be a "junk dealer." Nor is appellee's business and the place where it is conducted properly described as a "second-hand store." In *Eastman v. City of Chicago*, 79 Ill., 178-180, it was held that booksellers dealing in such stock as is usually kept in a retail book store, buying and selling second-hand books in connection with their other business would be unjustly characterized as "dealers in second-hand goods," and are not liable to penalties imposed against such dealers who have not first obtained a license from the city. In like manner bottles which are as sound and unworn as the day they were made do not come under the meaning unusually attached to "second-hand" goods, by which term is ordinarily meant not only things that are old or have been used, but such as are more or less the worse for wear and use, like cast-off clothing or old and discarded furniture. In *City of Duluth v. Bloom*, *supra*, it is said that the term "second-hand store," if not qualified or limited, would include any store in which any kind of second-hand goods are dealt in, such as second-hand furniture or second-hand books. In the statute under consideration (R. S., par. 95, art. V, chap. 24) the power to "tax, license and regulate" includes by the words used "second-hand and junk stores," and authority is granted to forbid such stores purchasing or receiving from minors without consent of their parents or guardians. The second-hand and the junk store are thus classed together in a manner indicating that the legislature had in mind second-hand stores in the nature of or doing a business similar to that carried on by junk stores where inducements are liable to be held out to minors to steal material in order to sell it at such stores. In the case last referred to the Minnesota Court held that a dealer in new and second-hand furniture was exempt from penalty under an ordinance requiring a "pawnbroker or dealer in second-hand goods" to obtain a license,

the ordinance applying "to any person keeping a second-hand store or junk shop." It was held that the provisions of the ordinance were intended "to be limited to second-hand stores of the class commonly known as junk shops." We are of opinion that a store where bottles new and old are exclusively dealt in is not a second-hand store within the meaning of the statute merely because bottles which have been used but are as good as ever, in no way distinguishable as bottles so far as appears from such as are new, are bought and sold there in the ordinary course of business, together with bottles which are absolutely new. In the most literal sense it would be a misuse of terms to call a place of business a second-hand store, where the dealing in second-hand material is merely an incident of the business, not an essential part of it, nor its principal purpose. It follows from what we have said that the city council had no power to enact an ordinance requiring one keeping a place exclusively for the purchase and sale of new and second-hand bottles and dealing in them to be specially licensed.

Appellee introduced in evidence certain ordinances of the city imposing restrictions upon one who is a "dealer in second-hand articles or keeper of a junk shop." These ordinances, however appropriate for the kinds of business to which they are properly applicable, would be intolerable if applied to a business such as appellee's. Objection is made by appellant that this evidence was incompetent. We think it was admissible as tending to show that classing appellee's business with that of the ordinary "dealer in second-hand articles or keeper of a junk shop" would be unreasonable and not within the intention of the statute authorizing the city council to "tax, license and regulate second-hand and junk stores."

It is assigned as error that the trial court entered judgment against the city for costs. The statute requires that in *quasi*-criminal cases appealed to the Criminal Court from a justice of the peace, the party so appealing shall pay ten dollars for the use of or to the clerk of the Criminal Court, who is required in case the appeal is decided in favor of such

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appellant to return the ten dollars to the latter. R. S. chap. 53, sec. 32. A judgment for costs cannot be entered against a municipal corporation when the defendant in any such prosecution is acquitted. *Anderson v. Schubert*, 158 Ill., 75-77. For the error in this respect the judgment of the Criminal Court must be reversed and the cause remanded, with directions, however, to that court to dismiss the suit.

Reversed and remanded with directions.

Abel Davis, recorder, et al., v. The Abstract Construction Company.

Gen. No. 12,418.

1. **RECORDER—nature of business of, in making abstracts.** When the county undertakes, pursuant to the authority conferred upon it by statute, to make and sell abstracts for compensation, it does so in the exercise of its private, and not of its governmental functions.

2. **RECORDER—when may deny access to records.** While by statute the public is entitled to free access to records of a public nature, such as are by law required to be kept by the recorder, yet the recorder may deny free access to records, such as tract indices and abstract books used by him in connection with the private business of the county as an abstract maker, where the granting of such access would result in competition in the business of abstract-making.

3. **STATUTES—when not to be construed as changing common law.** It is a general rule in the construction of statutes that they are not to be construed as changing the common law farther than by their terms they expressly declare.

Injunctional proceeding. Appeal from the Superior Court of Cook County; the Hon. MARCUS KAVANAGH, Judge, presiding. Heard in the Branch Appellate Court at the April term, 1905. Reversed and remanded. Opinion filed June 2, 1905.

Statement by the Court. This is an appeal from an interlocutory order granting an injunction which *inter alia* restrains the recorder and the commissioners of Cook county until the further order of court from in any manner interfering with the appellee or its employees "in consulting the books or any of the files, papers or records in the possession of the defendant, Abel Davis, Recorder of Cook county, or

from taking extracts, data or information therefrom or making abstract books therefrom or from having access to the office or offices of said recorder during office hours through the employees of said complainant." The order restrains the commissioners "from all acts of whatsoever nature or kind which may interfere with the complainant in its work of making the abstract books mentioned in the bill of complaint filed herein or from taking abstracts or information from the books in the recorder's office, or from consulting the said books in the possession of" the recorder, "and taking extracts, information and data therefrom," from interfering with appellee "in and about its business of posting from the books in the possession of the recorder" or from "inspecting and taking data from instruments filed from day to day as shall be requisite and necessary to the complainant in its work of making abstract books from the public records in the office of the recorder of Cook county."

It appears from the bill of complaint that appellee was incorporated in February, 1904, under the laws of this State for the purpose of compiling and making abstract books of title to real property in Cook county and selling abstracts. It is averred that in the recorder's office of Cook county there are about 9,000 record books, and also 180 grantor indices, 180 grantee indices, 116 corporation books; that about 600,000 suits have been commenced in the various courts of said county since the fire of 1871, and that to furnish abstracts of title to property in Cook county it is necessary to make abstract books from the books and records in the recorder's office and clerk's offices of the various courts and consult each and every one of said volumes; that about 100,000 estates have been probated; that in the county clerk's office are books relating to tax sales and special assessments so numerous that complainant is not able to state the exact number, and that 30,000 special assessment suits have been begun since said fire of 1871, and that it is necessary to consult all of said books and records in making abstracts and to go through every collector's office in every township in Cook county to obtain adequate data and information; that to prepare ab-

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stract books necessary for said business a large force of men must be employed, years of time taken and large expense incurred.

The bill charges that the recorder and divers of the county commissioners who have combined and confederated with each other and with unknown persons to injure appellee, pretend that appellee has no right to make abstract books from the records of the recorder, except the books mentioned in divisions 1, 2, 3 and 4 of section 12 of chapter 115 of the Revised Statutes; that the defendant, Abel Davis, Recorder, has stated and threatened that he will oust appellee's employees from said recorder's office and prevent them from taking extracts and information from the books which are necessary to appellee's business; that said recorder has taken legal advice and been advised, as appellee is informed and believes, that appellee has no such right as it claims in that connection, and pursuant thereto states that he will not permit appellee's employees to continue their said work in said office, and that he will carry out said threats unless restrained by injunction, in which course said recorder is instructed and directed by other defendants, county commissioners of Cook county.

HARRY A. LEWIS, County Attorney, WILSON, MOORE & McILVAINE, WILLIAM F. STRUCKMAN, Assistant County Attorney, and FRANK L. SHEPARD, for appellants.

DARROW, MASTERS & WILSON, for appellee; PHILIP STEIN, EDGAR L. MASTERS and GEORGE A. TRUDE, of counsel.

MR. JUSTICE FREEMAN delivered the opinion of the court.

The injunction order appealed from restrains the recorder and the commissioners of Cook county from in any manner preventing or hindering appellee or its employees from taking extracts, data or information or making abstract books from any of the files, papers or records in the recorder's possession, and from all acts which may interfere with appellee in "taking abstracts or information from the books in

the recorder's office" and in taking extracts, information and data therefrom. The phraseology of the injunction is somewhat vague, but it is sufficiently manifest that the purpose is to permit appellee to make abstract books, using any and all of the books in the recorder's office for that purpose.

As to most of the books in the recorder's possession which are mentioned in the bill of complaint, and included in the injunction, there is no contention and apparently no difference of opinion. It is conceded on all sides that appellee and the general public have the right under the statute to inspect and examine them and "take memoranda and abstracts thereof without fee or reward." These books are the ones mentioned in the first four paragraphs of section 12, chapter 115, and are such books as the recorder is by the statute unconditionally required to keep, including entry books, grantors' indices, grantees' indices, the indices in which are "entered in alphabetical order the name of each grantor and grantee" as well as the indices to recorded maps, plats, etc. R. S. chap. 115, sec. 12.

By the fifth paragraph of that section of the statute, however, the recorder is also directed to keep "when required by the county board, an abstract book which shall show by tract every conveyance and incumbrance recorded," with date of instrument, time of filing it and book and page where recorded; "which book shall be so kept as to show a true chain of title to each tract and the incumbrances thereon as shown by the records of his office." In Cook county such requirement has been made. The abstract book thus provided for is apparently a tract index and is described in Warvelle on Abstracts (p. 83, sec. 8) as follows: "The tract index occupies much the same position in the abstract office that the great ledger does in the counting room. It is the receptacle for all the notes of the entry books, where the great mass of each day's transactions is separated, classified and arranged, and exhibits at a glance on its broad pages the balance sheet of all the land titles of the county. It is the foundation stone upon which the entire superstructure of the business rests, and the source from whence the examiner

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draws all his primary information in preparing the abstract." The provision for keeping such "abstract book" or tract index was not new to the statutes of this state when it was re-adopted by an Act of 1874 in force July 1 of that year. In that Act are provisions authorizing the county board in any county where abstract books have not previously been kept to procure such abstract books to be made at the cost of the county, showing a connected chain of title up to the time of the taking effect of the Act. These "abstract books" or tract indices, which are, it is said, compilations from the books of original record, are in part the subject of the present controversy, appellee claiming the right which it is charged the recorder refuses to allow it to exercise, not only of free access to them for inspection and examination, but to take memoranda and abstracts and to make abstract books therefrom to the fullest extent. The right thus claimed, as stated in the bill of complaint, is equivalent to making copies of these books for appellee's own use, thus saving the greater labor and expense of making the compilations from original sources.

The bill of complaint alleges that about the year 1875 the county of Cook purchased certain tract books of Williams and Thielke, which books covered the period from October 9, 1871, when the great fire of that date destroyed the then existing records. While the law was as stated, the recorder of Cook county in February, 1886, by direction of the board of commissioners, notified a firm of abstract makers in Chicago that thereafter the firm would be denied access to the original instruments and records of his office for the purpose of making copies of abstracts for their own private gain. Said firm filed a bill in the Superior Court and obtained an injunction against the recorder. This was reversed upon appeal to this court and it was held that the complainants were not entitled as a matter of legal right under common law rules to have access to the original instruments in the custody of the recorder in order to make abstracts of them for the purposes of their private business. *Scribner v. Chase*, 27 Ill. App., 36-42. Pending this suit the legislature amend-

ed the Act of 1874 by an act in force July 1, 1887, adding section 21 (R. S. chap. 115), which is as follows:

"All records, indices, abstract and other books kept in the office of any recorder, and all instruments filed for record therein shall, during office hours, be open for public inspection and examination; and all persons shall have free access for inspection and examination to such records, indices, books and instruments, which the recorders shall be bound to exhibit to those who wish to inspect or examine the same; and all persons shall have the right to take memoranda and abstracts thereof without fee or reward."

At the same session of the legislature an act was adopted authorizing such recorders as are required by the county board to keep abstract books, to make and sell abstracts of title, and fixing the fees and compensation therefor, which act was approved June 16, 1887, and was in force July 1. This act authorized and required recorders in the counties so designated to keep judgment dockets and indices thereto showing all judicial proceedings affecting title to real estate in any such county, tax sale books with indices showing sales or forfeitures for unpaid taxes and assessments, and such other books as are usual or necessary to be kept for the purpose of making complete abstracts of title to real estate. The first section contains a proviso as follows: "Provided that nothing in this act shall be construed to empower the recorder to prevent the public examining and taking memoranda from all records and instruments filed for record, indices and other books in his official custody, but it shall be his duty at all times when his office is or is required by law to be open, to allow all persons without fee or reward to examine and take memoranda from the same." R. S. chap. 115, sec. 25. The next section authorizes the recorder to make abstracts of title to real estate for all persons desiring them and to charge therefor.

When the county undertakes pursuant to the authority so conferred to make and sell abstracts for compensation "it does so in the exercise of its private and not of its governmental functions." *Wagner v. Rock Island*, 146 Ill. 139-

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153-4; *City of Chicago v. Selz, Schwab & Co.*, 104 Ill. App. 376-381; *City of Chicago v. Town of Cicero*, 210 Ill., 290-297. A business so carried on by a municipal corporation or by a county under legislative authority may be in a sense public in its nature because for public advantage, and in another sense private, since it is a business which may be carried on by a private corporation, examples of which are, it is said, the kinds of business carried on by common carriers, telegraph companies and gas companies. *Chicago v. Cicero*, *supra*. It is evident that if appellee, preparing to engage in the business of making and selling abstracts for its own emolument, can avail itself of the work done by the county in the capacity of a private corporation, and instead of making its own compilations and abstract books, which the bill states "require for their preparation a large force of men and years of time" at a very considerable expense, can without compensation simply copy abstract and other books made by the recorder for making and selling abstracts, and from the material thus acquired make and sell abstracts itself in competition with the county, it will acquire a valuable property without compensation which has cost the county a large sum of money. This would include not only compilations made by the recorder from the records of his own office, but judgment dockets and tax sale and other books with their indices made from other records, the making of which according to the bill of complaint requires search in "every collector's office in every township in the County of Cook," as well as an examination of the records in the office of the city clerk and the clerks' offices of every court of record, State and Federal, in the county.

Stress is laid in the bill upon the alleged fact that the Chicago Title and Trust Company has a monopoly outside of the competition of the recorder, of the abstract business in Cook county, although it charges more than the recorder for the same service; and it is alleged that the people of Cook county are interested in having appellee become "a real and active competitor" of said Chicago Title and Trust Company, and that such competition will be a benefit to the

people. It does not, however, follow from anything in the record that the proposed competition by appellee will be of benefit to anyone other than itself and its stockholders. For aught that appears it may itself enter into combination with the alleged existing monopoly or sell out to it; but whether so or not, we are unable to discover any bearing of the allegations referred to upon the real question to be determined. That question, as we look at it, is whether appellee has the right to make copies of the compilations made by the recorder contained in abstract books of tract indices, of the judgment dockets and indices thereto showing all judicial proceedings affecting title to real estate in Cook county, of the tax sale books with indices thereto showing sales or forfeitures of all lands in the county for unpaid taxes and assessments, and of such other books as are usual or necessary to be kept for the purpose of making complete abstracts of title to real estate. If appellee has such right it is owing entirely to the statute. As before intimated, appellee would have no such right at common law. *Scribner v. Chase, supra*, and cases cited. In *Meachem on Public Offices and Officers*, chap. 6, sec. 739, it is said: "The duty of the Recorder to permit extracts and copies of the records of his office to be made, being confined to those who have a special interest in some particular chain of title, it is well settled that unless required to do so by statute as in some states, the Recorder will not be compelled to permit parties having no such special interest to make general abstracts of title for the purpose of afterward furnishing as a business enterprise the information so acquired to persons who may desire it."

As before stated, section 21 of chapter 115 of the Revised Statutes is an amendment added to the act of March 9, 1874, by an act approved May 31, 1887. By its terms "All records, indices, abstract and other books" and instruments filed for record are required to be open for public inspection and examination, and all persons "have the right to take memoranda and abstracts thereof without fee or reward." This provision undoubtedly refers to the "abstract and other books" referred to in sections 12 and 19 of the act thus

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amended. (Chap. 115.) The words "other books" by the rules governing the interpretation of statutes are to be regarded as meaning books of the same kind as those specially enumerated, including the abstract books or tract indices. *Stites v. Wiggins Ferry Co.*, 97 Ill. App. 157-159; *Matter of Swigart*, 119 Ill. 83-89. As to these books, it is clear that appellee and "all persons" are by that amendment entitled to "take memoranda and abstracts" of them fully and freely. The right, however, to take memoranda and make an abstract does not necessarily include a right to make a substantial copy of an abstract book or tract index. To give the language used that meaning, would be to put into the statute by construction what the law-makers have left out. It is a general rule in the construction of statutes that they are not to be construed as changing the common law further than by their terms they expressly declare. *Canadian Bank v. McCrea*, 106 Ill. 281-289; *Mackin v. Haven*, 187 Ill. 480-493. We are not at liberty, therefore, to extend the meaning of the words employed in the statute, nor to speculate upon what may have been the intention of the legislature. *State Board of Health v. Ross*, 191 Ill. 87-92. The purpose as expressed evidently is to allow all persons the right to inspect and examine the books referred to, to take any memoranda from them, and to make abstracts if so desired of any of the entries therein contained, and that is all. The language used does not, in our opinion, include the right to go further and make substantial copies of entire books, to do which would require such temporary exclusive possession and monopoly as might very well interfere with the use of the volumes by the recorder or the general public.

At the same session of the legislature, but later (Act approved June 16, 1887, in force July 1, 1887), the Act was passed expressly authorizing recorders in counties where they shall have been required by the county board to keep the tract indices described in the statute and called abstract books, to go into the business of making and selling abstracts of title to real estate. In the first section of the act (R. S. chap. 115, sec. 25), authority is given and the recorder is

required, as we have seen, to keep judgment dockets and indices showing judicial proceedings affecting title to real estate, tax sale books showing sales and forfeitures and other books usual or necessary for making complete abstracts of title. It will be noted that the proviso in this section is to the effect that nothing in the act shall be construed to empower the recorder "to prevent the public from examining and taking memoranda from all records and instruments filed for record, indexes and other books in his official custody," that is "other books" of the kind enumerated, and it is made his duty to allow all persons to examine such records and books and take memoranda from them. The proviso is in substance a mere repetition of the requirements of section 21 of the prior enactment. The new books authorized to be kept by this section one of the later act are not kept by the recorder in his strictly official capacity as a public officer, but in his private capacity as a competitor with private persons in the business of abstract making for compensation. A public office is defined as "the right, authority and duty created and conferred by law by which for a given period an individual is invested with some portion of the sovereign functions of the government to be exercised by him for the benefit of the public." Meachem on Public Offices and Officers, sec. 1. The business of abstract making is not carried on by the county recorder in the exercise of any of the sovereign functions of government but in the use of powers as a private corporation specially conferred by the legislature, which are, however, impressed with a public use because conferred for the public advantage. *City of Chicago v. Selz, Schwab & Co., supra*. It may well be doubted whether the new books authorized or required by the section we are considering and which are provided for to be used solely for making abstracts of title to real estate for sale to private persons are in the recorder's "official custody" as a public officer within the meaning of the words used in this statute. They are not "abstract books" within the meaning of section 21 above quoted. The abstract books there referred to are defined in the fifth paragraph of the preceding section 12 of the Act of

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1874 to which act section 21 is an amendment. By that definition an "abstract book" is, as we have said, nothing more nor less than a tract index. The new books authorized by the first section of the later act are not made from any records in the recorder's possession. They are compilations from records of the courts and from other records which are as open to the general public and to appellee as they are to the recorder. They can be called abstract books only in the sense that they are used in the business of making abstracts for sale, and they differ in character from "records and instruments filed for record, indexes and other books in his official custody" enumerated in the proviso to that first section of the act under consideration approved June 16, 1887. They are not books necessarily or usually kept by a recorder. They have no relation to the duties of the recorder as a strictly public officer. They are not records in any proper sense, and so far as we can perceive are not required by the statute to be exposed to the examination of persons desirous of taking memoranda and abstracts thereof.

It follows from what we have said that the interlocutory order granting the injunction in controversy is erroneous, and it must be reversed and the cause remanded for proceedings not inconsistent with the views expressed.

Reversed and remanded.

City of Chicago v. Charles H. Slack.

Gen. No. 11,777.

1. **ORDINANCE**—*what may be considered in determining reasonableness of.* The legislative expressions of public policy upon a subject sought to be regulated by municipal ordinance may be considered in connection with such ordinance to determine the reasonableness of its provisions.

2. **LIQUOR**—*power of municipality to regulate sale of, by grocer.* A municipality has the power by ordinance to require a grocer selling liquors in quantities less than one gallon to take out a license, notwithstanding no bar is kept by such grocer.

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Action of debt. Appeal from the Criminal Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1904. Reversed and remanded. Opinion filed June 2, 1905.

HOWARD S. TAYLOR and GEORGE H. KRIETE, for appellant.

No appearance for appellee.

MR. JUSTICE SMITH delivered the opinion of the court.

The city of Chicago commenced this action in debt before a justice of the peace in Cook county to recover the penalty prescribed in the city ordinance prohibiting the sale of liquor without a license. A judgment was rendered by the justice against appellee, and an appeal was taken from that judgment to the Criminal Court of Cook county. On the trial in that court, the jury were instructed to find for the defendant. Judgment was rendered against appellant for costs, and this appeal brings the case to this court for review.

The undisputed evidence as disclosed by the record is that on January 7, 1903, appellee was engaged in business at No. 45 East Randolph street in the city of Chicago as a wholesale and retail grocer and liquor dealer; that on that day a half pint of whiskey was sold in appellee's place of business, and that liquors were displayed together with the prices thereof in the above-mentioned store in quantities less than one gallon. It further appears that appellee was notified on January 7, 1903, by a police officer of appellant that his license had expired, and that it would have to be renewed and that appellee said he would not renew his license.

The following ordinance of the city of Chicago was admitted in evidence:

"1182. (Unlicensed Sales—PENALTY.) Any person who shall hereafter have or keep any saloon, tavern, grocery, ordinary, victualing or other house or place within the city of Chicago for selling, giving away, or in any manner dealing in intoxicating liquors in quantities less than one gallon, or who, by himself, his agents or servants, shall sell, give away, or in any manner deal in intoxicating liquors in quan-

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tities less than one gallon, or who, by himself, his agents or servants, shall keep a dram-shop for the sale of liquors in quantities less than one gallon without a license therefor, in pursuance of this chapter, and other ordinances of the city of Chicago, shall, upon conviction, be fined not less than twenty dollars nor more than one hundred dollars for each and every offense."

Appellee testified on the trial that he was in business on January 7, 1903, and at the time of the trial as a wholesale and retail grocer and wine merchant, selling wines and liquors to consumers in all sizes of packages, nothing less, however, than one-half pints; that there was no bar at No. 45 Randolph street and never had been one there or at any other place which he kept, and that no liquors were drunk on the premises.

The express power of the city of Chicago to license, regulate and prohibit the sale of liquor in the city of Chicago is given in clause 46, section 1, article 5 of the Cities and Villages Act. The power to pass all ordinances, rules and make all proper or necessary regulations therefor is granted in clause 96 of the same Act.

Clause 46 was before the Supreme Court for construction in *The People ex rel. v. Cregier*, 138 Ill. 401, and it was held that the authorities of cities and villages had power beyond question under this clause to prohibit the sale of intoxicating liquors altogether. Under these powers to license, regulate and prohibit the sale of liquor and to pass ordinances to carry into effect the powers granted the City Council of the city of Chicago enacted the above ordinance.

The Criminal Court held that the ordinance was not intended to apply to such a business as the defendant conducted, and instructed the jury to find a verdict for the defendant. We think this was error. Section 2 of the Dram-Shop Act prohibits the sale of intoxicating liquors in quantities of less than one gallon without a license; and section 3 of that act prohibits municipal authorities from issuing licenses except upon the payment in advance of the license fee, which may be determined by such authorities, not less

than at the rate of \$500 per annum. In section 7 of the Act we find an enumeration of the places which, if intoxicating liquors are sold therein in violation of the act, shall be taken and held and declared to be common nuisances. This section shows that grocers as a class of dealers were not only not overlooked by the legislature but were in the legislative mind and expressly named. We think it clear that under the provisions of the Dram-Shop Act and the construction placed upon it in *Wright v. The People*, 101 Ill. 126, the business of the defendant Slack, as shown by the evidence, was within its terms and provisions. The statute must be regarded as an expression of the legislative policy of the state upon the subject of the sale of liquors and may be considered in connection with ordinances upon the same subject in determining the question of the reasonableness of the latter, and their construction.

The ordinance under which this action was brought follows closely the statute above referred to, and must be given a similar construction as to its application to persons who sell intoxicating liquors in less quantities than one gallon, and to the places where liquors are so sold. We are of the opinion that the ordinance tested by the statute and the reasoning of the court in *Wright v. The People*, *supra*, covers and was intended to cover the case of the defendant as disclosed by the evidence and that it is reasonable and valid. The testimony of the defendant himself showed that without doubt he had violated the ordinance and was liable for the penalty therein provided.

For the error indicated the judgment of the Criminal Court is reversed and the cause remanded.

Reversed and remanded.

Ballard v. Shea.

Frank E. Ballard v. Daniel W. Shea.

Gen. No. 11,784.

1. **CONTRACT**—*when not subject to construction.* Where a contract is plain in its meaning, there is no room for construction notwithstanding a particular contingency subsequently arising is not covered thereby.

2. **IMPLIED CONTRACT**—*when does not arise.* An implied contract does not arise to cast upon a party an obligation where an express contract covering the subject-matter of the alleged claim has been made.

3. **INSTRUCTIONS**—*when, upon implied contract, erroneous.* Instructions which predicate a right of recovery upon an implied contract are erroneous where the subject-matter of the plaintiff's claim was covered by an express contract and no implied contract has existed as a matter of law.

Action of assumpsit. Appeal from the Circuit Court of Cook County; the Hon. LOCKWOOD HONORE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1904. Reversed. Opinion filed June 2, 1905.

Statement by the Court. In 1891, Frank E. Ballard, appellant, and James Darlow were engaged in the real estate business in the city of Chicago under the firm name of F. E. Ballard & Co. Appellee, Daniel W. Shea, was also engaged in the same business. F. E. Ballard & Co. were then engaged in trying to sell forty and one-half acres of land, eight blocks, located in the town of Cicero, Cook county, Illinois. The land was owned by Richard Street. Appellee Shea made inquiry at the office of F. E. Ballard & Co. regarding this land, and obtained the terms upon which the property was offered for sale. Appellee, as agent for his customers, claims to have entered into negotiations with Ballard & Co., as agents for the owner, for the purchase of the land. On February 7, 1891, E. S. Cummings, Francis Murphy, John Devlin and E. G. Shea, a brother of appellee, whom appellee claims he represented, made a contract with Richard Street for the purchase of the entire eight blocks of land for \$141,750.

On the same day Ballard & Co. made a written agreement with Shea as follows:

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"Chicago, Feb. 7, 1891.

Daniel W. Shea,

We agree to pay you one and a quarter per cent. commissions on the Street sale of 40½ acres (8 blocks) of land in Hutchinson & Rothermoles' Sub., Sec. 18, T. 39, R. 13 E. of 3rd p. m., when said sale is fully carried out as per agreement this day made, price \$141,750, on the express understanding that no other agent or broker shall make claim for such commission.

F. E. BALLARD & Co.,

J. D."

The parties who signed the contract as purchasers of the eight blocks formed a syndicate for the purpose of disposing of the land, thus expecting to realize a sufficient sum to carry out the purchase of land from Street. They were not successful in selling sufficient shares in the syndicate to enable them to carry out the purchase of the entire eight blocks according to their contract with Street made February 7, 1891, and referred to in the above quoted agreement of the same date. Finding themselves unable to carry out the purchase, about July 1, 1891, the purchasers obtained a cancellation of the original contract of February 7, 1891, with Street, by paying Street about \$600 or \$800 and made a new contract with him for four of the eight blocks.

About seven years after the transaction, on March 9, 1898, appellee Shea brought this action against appellant Frank E. Ballard and James Darlow for commissions on the sale. The declaration filed on the same day consisted of a special count and the common counts. The special count avers that Shea, the plaintiff, was a real estate broker and as such was employed by the defendants to aid them in disposing of forty and one-half acres of land at the price of \$141,750, and agreed to pay him one and one-quarter per cent. commissions upon the sale at the above price according to the terms of a written agreement, and sets up the above quoted agreement. It avers that plaintiff fully carried out the agreement and that the sale at the said price was fully carried out and that the defendants have failed and refused to pay him \$1,771.87 for his commission.

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Two amended additional counts were filed September 24, 1901, by leave of court, which allege the same employment and the same contract, setting it out in words and figures, and aver that plaintiff accepted the employment and made a sale of one-half the land, or four blocks, which sale was carried out, the original agreement having been modified so that the purchasers furnished by plaintiff purchased one-half or four blocks of the land, the original payment of \$5,000 made to the owner being applied on the purchase price of the four blocks, and that the purchase of the four blocks was fully carried out and that plaintiff was entitled to his commission of \$3,000 and interest thereon upon the sale, which had never been paid to him.

Subsequently, on March 8, 1902, two more additional counts were filed, by leave of court, stating the same cause of action as stated in the additional counts filed September 24, 1901, and seeking to recover on the same theory.

Appellant Ballard filed his pleas of the general issue and the Statute of Limitations to the declaration and to the additional counts at the proper times. On October 23, 1902, the defendant Ballard filed a further plea to the special counts, alleging that the services were voluntarily rendered by plaintiff without request and that there was no good or valid consideration for the agreement. The court sustained demurrers to the pleas of the Statute of Limitations and appellant elected to stand by his pleas. The court also sustained a demurrer to the additional plea of defendant. On the trial of the cause appellee withdrew the common counts and the case was tried on the special counts alone. A verdict was returned for the plaintiff for \$1,508.74 and judgment was rendered thereon.

SAMUEL WARE PACKARD, DE FOREST M. NEICE and WILLIAM E. CLOYES, for appellant.

PETIT, PARKER & KOPF, for appellee.

MR. JUSTICE SMITH delivered the opinion of the court.
There is no material conflict in the evidence in this case.

It clearly appears that the purchasers under the contract of February 7, 1891, were unable to carry out and perform their part of the contract, by paying the balance of the purchase money when it became due. Mr. Street, the owner of the property, was ready to perform his part of the contract and convey the property according to its provisions. The purchasers made every effort to save the money which they had paid and prevent a forfeiture. They finally induced Street, by paying him several hundred dollars, to release them from the contract, and it was abandoned and given up, at the request of the purchasers. As a part of the same transaction a new contract was entered into for the purchase of four blocks instead of eight blocks.

On the trial the plaintiff amended his declaration by withdrawing the common counts. The declaration then, as it finally stood, counted on the special contract set forth in the special counts. This was an express contract, and there was no foundation in the case for a recovery on an implied contract. The plaintiff was bound to prove the contract set out in his declaration and its performance on his part, and that the sale of the land therein mentioned was fully carried out, in order to show that he was entitled to the commission which appellant's firm had agreed to pay him. The contract of purchase was never carried out. The purchasers were unable to pay the purchase money. Upon this state of facts there could not be a recovery under the terms and conditions of the contract declared on in the declaration. The contract was not a general contract to pay commissions on sales made by appellee. If it had been a very different question would have been presented. It was a contract to pay commissions at the rate named on the particular sale of February 7, 1891, which had been made, when that sale was fully carried out according to the agreement therefor, subject, however, to the further condition "that no other agent or broker shall make claim for such commissions." No ground is perceived for construing the contract in such a manner as to cover any other sale than that named therein. There is nothing in the contract itself, or the relations of the parties, or the facts

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shown in the record which indicates that the words used did not express the precise contract intended. "Courts cannot adopt a construction of any legal instrument which shall do violence to the rules of language or the rules of law. Words must not be forced away from their proper signification to one entirely different, although it might be obvious that the words used, either through ignorance or inadvertence, expressed a very different meaning from that intended." 2 Parsons on Contracts, 6th ed., secs. 494, 495, 496. The language of the instrument declared on is not ambiguous, and if it does not cover the contingency that happened, it is no part of the duty of the court, by construction, to make it. As said in *Smith v. Davis*, 48 Ill. App., at page 202: "Where parties employ language having a plain and ordinary meaning it is not competent for the courts to destroy that meaning, even though it may appear that in a certain contingency the result would be somewhat harsh or even unexpected. It is to be presumed that the parties fully considered all contingencies, and if they did not, that they intended to abide by the terms of the contract in any event."

It is clear, we think, that the contract sued on does not contemplate the payment of a commission on a sale of four blocks made in July, 1891. The parties contemplated the payment of a commission on the sale of February 7, 1891, of the whole tract of land, and no other sale. The clear and concise language used is not capable of any other construction, and negatives any other meaning. In *Meachem on Agency*, sec. 965, p. 793, the author says: "The parties are at liberty to make the payment of commissions dependent upon such lawful conditions and contingencies as please them, and where no improper advantage is taken, their express stipulations must prevail, although the result be that the broker finds that he has risked his labor and expenses upon the mere caprice of his employer."

The principle here involved is well stated in *Illingsworth v. Slosson*, 19 Ill. App. 612, as follows: "Where the parties have made an express contract, no contract will be implied, and the action must be upon the express contract, and the

recovery under its terms, and no recovery on the *quantum meruit* is authorized or can be sustained. Walker v. Brown et al., 28 Ill. 378; Ford v. McVay, 55 Ill. 119; Sickels v. Pattison, 14 Wend. 257."

The rulings of the trial court and the instructions given were not in harmony with the views here expressed. In our opinion the motion of defendant at the close of the plaintiff's case for a peremptory instruction to the jury to find for the defendant should have been allowed for the reasons above given. The court should have instructed the jury at the close of the evidence to find for the defendant. The refusal of the instruction asked by defendant was error.

The second and third instructions given at the request of plaintiff are erroneous for the reason that they do not base the right to a recovery upon the contract sued on, but upon an implied contract. For the same reason the court erred in giving the instruction which the court gave upon its own motion.

For the reasons indicated the judgment is reversed.

Reversed.

Collins Ice Cream Company v. N. L. Normandie.

Gen. No. 11,821.

1. **INSTRUCTIONS**—*must be based upon the evidence.* An instruction, or part thereof, predicated upon no evidence in the cause, is erroneous.

2. **PRESIDENT**—*limit of implied power of.* The implied authority of the president of a private corporation does not authorize him, by virtue of his office, to appropriate the property of the corporation even for payment of salary or other indebtedness due him.

3. **PERSONAL PROPERTY**—*what does not affect title of corporation to.* The casual remark of the president of a corporation, to the effect that he personally, and not the corporation represented by him, was the owner of personal property, does not affect the title of the corporation to such property or render it liable to levy at the instance of the judgment creditor of such president, in the absence of a showing of authority upon the part of such president to bind

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the corporation by such remark, when such president, when he made such remark, was not engaged in the business of the corporation.

Action of replevin. Error to the Circuit Court of Cook County; the Hon. JOSEPH P. ROBERTS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1904. Reversed and remanded. Opinion filed June 2, 1905.

Statement by the Court. This is an action of replevin commenced in the Circuit Court of Cook county by the plaintiff in error against the defendant in error to recover possession of a horse which had been levied upon by the defendant in error as a constable under a writ of execution running against one J. D. Collins.

The evidence on behalf of the plaintiff tended to show that the plaintiff, at the date of the levy of the execution, was a corporation engaged in manufacturing and selling ice cream in the city of Chicago; that J. D. Collins was then and had been its president, receiving a salary for his services, but owned no stock in the corporation; that the horse in question was purchased by the plaintiff on the 9th day of September, 1898, to be used in its business, and it paid \$400 for the horse, the amount being charged to its horse, wagon and harness account on the books of the company; that the plaintiff in its business kept from forty to fifty horses, and that different employees of the company, including J. D. Collins, each used a horse exclusively and was in the habit of speaking of the same as his horse.

The evidence further tends to show that when the execution was levied the horse in question had been placed temporarily in a stable other than the plaintiff's stable by J. D. Collins and that when the levy was made by the defendant he removed the horse to another stable after demand was made upon defendant for the horse, and thereupon the replevin writ was issued and served upon the defendant.

The evidence on behalf of the defendant tends to show that on the day the levy was made J. D. Collins had the horse in his possession while at a driving park and that he was overheard to say that the horse belonged to him and had been entered in his name in a race at said park and that the pro-

prietor of the livery barn where the horse was at the time the levy was made pointed out the horse to the defendant when inquiry was made as to where the horse of J. D. Collins was in the barn; that J. D. Collins had stated that he had purchased the horse and had entered him in the race for Monday, and that he also stated that the horse belonged to his brother, W. H. Collins.

On the trial the jury returned a verdict for the defendant and judgment was entered on the verdict. This writ of error is prosecuted to reverse the judgment.

STIRLEN & FOULDS, for plaintiff in error.

JOHN J. SWENIE, for defendant in error.

MR. JUSTICE SMITH delivered the opinion of the court.

At the trial plaintiff in error requested the court to give four instructions to the jury. The instructions were to the effect that if the jury believed from a preponderance of the evidence that the plaintiff was the owner of the horse and entitled to its possession, and that the same had been wrongfully taken or detained from the plaintiff by the defendant, the verdict should be for the plaintiff. The court refused to give the instructions as requested, but modified each of them by adding or inserting the following words: "Unless you find from the evidence that the plaintiff knowingly permitted J. D. Collins to hold out to the world that he was the owner of the horse in question." This action of the court was erroneous. The instructions as requested were proper, and should have been given. There was no direct or indirect evidence in the case upon which to base the modification. There was no evidence of any kind that the corporation had authorized its president to hold out to the world that he was the owner of the horse. The mere fact that J. D. Collins was the president of the plaintiff corporation did not authorize him to hold out to the world that he was the owner of any of the property of the corporation. In order to bind the corporation by any such statement or act it would be necessary to show authority from it to him. The implied author-

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ity of the president of a private corporation does not authorize him, by virtue of his office, to appropriate the property of the corporation, even for payment of salary or other indebtedness due him. *Emporium R. E. M. Co. v. Emrie*, 54 Ill. 345; *Joliet E. L. & P. Co. v. Ingalls*, 23 Ill. App. 45. He may without express authority do such acts pertaining to its ordinary offices as custom has imposed or necessity requires. *C., B. & Q. R. R. Co. v. Coleman*, 18 Ill. 298. Anything Collins may have said, therefore, adversely to the interests of the corporation as to the ownership of the horse, while not engaged in the business of the company as president would not be binding upon the company, or affect in any way its title to the horse. It follows that the casual talk or remark of J. D. Collins to the effect that the horse was his, afforded no basis for the modification of the instructions, in the absence of any evidence of authority to him from the corporation to make such representations.

For the error in modifying the plaintiff's instructions the judgment is reversed and the cause is remanded.

Reversed and remanded.

Rosehill Cemetery Company v. Wesley Dempster, et al.

Gen. No. 11,999.

1. STOCK-HOLDERS—*what not essential to operation of estoppel against.* It is not necessary that a stock-holders' meeting should be held in order to bind or estop the stock-holders from questioning an illegal act of the board of directors; but such an estoppel may arise by laches, predicated upon knowledge, or means of knowledge not availed of.

2. COMPENSATION—*when corporation cannot successfully attack, made to an officer.* Where the directors of a corporation, all of whom are large stock-holders and who together hold and represent a large majority of the stock of such corporation, provide for the payment of a special compensation to a salaried officer for a special and valuable service rendered by him, the corporation cannot successfully maintain an action to recover the compensation so paid, even though illegally provided for, in order that some innocent stock-holders or

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stock-holders not estopped to complain may indirectly benefit thereby.

Bill for accounting. Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed June 15, 1905.

EDWIN BURRITT SMITH and ROBERT F. PETTIBONE, for appellant.

CANNON & POAGE, for appellees.

Per curiam. December 4, 1899, appellant filed a bill against appellees, alleging therein, among other things, that the Rosehill Cemetery Company was duly incorporated under and by special acts of the General Assembly of Illinois, approved in 1859 and 1863. Soon after its incorporation it passed out of the control of its stockholders and into the hands of its creditors, who for many years and up to August, 1896, managed and controlled it in their own interests and in disregard of the rights of the stockholders. In the year 1881 a majority in amount of the stockholders entered into an agreement among themselves to begin and carry on proceedings to secure their rights as stockholders, and, in pursuance of this agreement, Killian V. R. Lansingh, administrator *de bonis non* of the estate of John Dempster, filed a bill in the Circuit Court of Cook county against Van H. Higgins, the complainant corporation and others, the other parties to the agreement becoming parties to the proceedings as intervening petitioners. Thereafter a decree was entered favorable to Lansingh. This decree was afterwards affirmed by the Appellate Court, and thereafter affirmed in part and reversed in part, in January, 1895, by the Supreme Court of Illinois.

The said Wesley Dempster and his partner, Samuel H. Sweet, together held 167 shares of the stock of complainant. Although they were parties to said stockholders' agreement, they took no active part in connection with the proceedings beyond contributing to the expenses, up to the time of the decision by the Supreme Court in 1895. The said Lansingh acted under said agreement for and on behalf of the entire

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syndicate of stockholders, devoting a large part of his time for a period of fourteen years to their interests. All said stockholders, except only said Dempster, his brother David and said Sweet, agreed to and did compensate said Lansingh (each transferring to him one-third of his stock) for the services so rendered by him on behalf of all.

After the filing of the mandate of the Supreme Court in the Circuit Court on April 6, 1895, many hearings were had, and a decree was finally entered on November 22, 1895, in accordance with the judgment of the Supreme Court. This decree disposed of all the main questions involved in the litigation favorably to the complainants. A reference was had to the master to take an account of certain matters, being mainly as to over-payments by the company to the creditors. That after the mandate of the Supreme Court was filed in this court, April 6, 1895, and said cause had been on hearing many times in an attempt to have various unsettled questions adjudicated and a decree entered in accordance with the mandate, negotiations in behalf of the parties to said stockholders' agreement were had with Henry J. Furber, representing the creditors of the corporation, who had continuously held control of it for over thirty years. The said Wesley Dempster—acting for himself, his brother and said Sweet's estate and to further their interests—actively participated in these negotiations, but without any agreement for compensation or any idea on the part of the other parties to the stockholders' agreement that he would expect or demand compensation for his services, such services being voluntary for himself, his brother and said Sweet's estate.

The creditors represented by said Furber held a minority of the stock of the corporation; and, in the settlement made with them, the parties to the stockholders' agreement purchased and acquired for the corporation such minority stock (about 700 shares) for \$70,000. The said Wesley Dempster, acting as trustee for the parties to the stockholders' agreement, entered into a contract with said Furber, providing, among other things, for such purchase.

Before assuming any liability to said Furber and his as-

sociates, said Dempster secured from the principal stockholders a written agreement binding them to indemnify him and pledging to him their stock (being practically all the remaining stock of the company) as further security for the obligation he was about to assume; also providing that, upon their coming into possession and control of the corporation, it would assume all rights, obligations and liabilities of said Dempster under said contract. This was afterwards done, and the corporation faithfully kept and performed the agreement so entered into between Dempster and said Furber. The settlement thus reached resulted in the termination of the litigation early in August, 1896. Thereupon the creditors of the corporation turned over the control thereof to its stockholders. The corporation assumed the contract of said Wesley Dempster with said Furber and duly paid and discharged, largely in advance, all the obligations assumed by said Wesley Dempster thereunder.

The parties to the stockholders' agreement (including Wesley Dempster), about the time they entered into control of the corporation, had an agreement among themselves to the effect that certain small adverse holdings, aggregating 47½ shares, of the stock still outstanding should be purchased and cancelled by and for the benefit of the corporation.

The said Wesley Dempster required the active parties of the stockholders' agreement and other stockholders to pledge their stock to him as indemnity to him for becoming nominally individually liable for the contract with Furber. He also had issued to himself personally, as further indemnity, 670 shares of the stock so purchased under the contract with Furber. He also had 5 shares of the stock so purchased issued to his son, Charles; which said 5 shares, reissued as 25 shares, the said Charles W. Dempster still holds. The said Wesley Dempster, while president of the corporation, purchased for his own account, in violation of the agreement of the stockholders above referred to, certain outstanding shares of stock owned by various small holders not members of the syndicate, making payments therefor, in some instances, with

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money of the corporation improperly loaned to him by himself for that purpose.

The said Wesley Dempster, previous to September 14, 1896, represented to some of the stockholders that he, having devoted a considerable part of his time for a number of months to said negotiations, ought to be allowed, by way of compensation to him for time spent in the negotiations and the liability he had incurred, to purchase with his own funds 20 shares of stock of one William H. Turner, a member of the board of managers of the company, which stock was part of that to be purchased by the company as aforesaid. This suggestion seems to have been acquiesced in; but, when it was found that said Turner would not accept \$2,000 and demanded \$3,000 therefor, said Dempster abandoned his plan, and purchased said stock with funds of the company, taking title thereto in his own name. Two weeks later, at a meeting of the board of managers of the corporation, at which there were present William H. Turner, Killiam V. R. Lansingh, Charles W. Dempster, Henry L. Pitcher and C. L. Dempster, said Wesley Dempster, then treasurer of the company, being also present, procured the adoption of the following resolution:

“Resolved, That the Rosehill Cemetery Company issue to Wesley Dempster fifty shares of stock of said company, out of any which said company may have purchased, which amount shall be in full for said Dempster’s services rendered in effecting a satisfactory settlement of the litigation between its stockholders and other matters relating to the welfare of said company.”

Said resolution was adopted without the authority of the stockholders, and has never been ratified or confirmed by them individually or at any regular meeting of the stockholders.

Said Wesley Dempster was paid a salary of \$300 per month for acting as treasurer of the corporation from the time the stockholders recovered control until some time after the passage of said resolution. Thereafter he became pres-

ident of the corporation, receiving the same salary. He had rendered no services to the company for which he had not been fully paid; the services which he voluntarily undertook on behalf of the stockholders who had joined in the stockholders' agreement were rendered on behalf of himself, his partner and brother. They were entirely voluntary and were rendered without any agreement for compensation or expectation on the part of the other stockholders that any compensation would be required. The compensation which said Wesley Dempster received as treasurer of the corporation, \$300 per month, was a large compensation for the time devoted by him to the business of the corporation. At the time of the passage of this resolution, making a gift to said Dempster, said Turner had parted with all his stock; said Charles W. Dempster was not the owner of any stock, and had no pecuniary interest in the corporation; and all of the stock of Lansingh, Pitcher and C. J. Dempster and the other stockholders was pledged to said Wesley Dempster as aforesaid. By reason of the issuance to said Wesley Dempster of the 690 shares of stock purchased by the corporation from Furber and Turner, there was at this time standing in the names of Wesley Dempster, his brother David, and the executrix of his then late partner, Samuel H. Sweet, a majority of all the stock of the corporation. Thus the said Wesley Dempster was at that time in control of the corporation and its managers then acted entirely as he requested and directed. The value of the stock of the corporation, thus attempted to be given to Wesley Dempster, was at that time and still is not less than \$25,000. Said Wesley Dempster, claiming under said resolution, retained the 20 shares of stock so purchased by the corporation from Turner and 30 shares of stock so purchased by it from Furber; and he thereafter, in 1898, when the stock of the company was reissued, five for one, caused the same to be reissued to himself at 250 shares of the present issue.

The said Wesley Dempster and his son, Charles W. Dempster, using trust funds of the corporation, purchased and caused to be issued to said Charles W. Dempster 3 shares of

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outstanding stock, which under the stockholders' agreement was to be purchased for the corporation. Said 3 shares of stock and said 5 shares so improperly issued to Charles W. Dempster were subsequently reissued as 40 shares to said Charles W. Dempster.

The said Wesley Dempster wrongfully caused to be issued to himself $8\frac{3}{4}$ shares of the outstanding stock, although the original certificates were pledged and held by said Lansingh for the payment of certain debts of a former owner, in violation of a rule of the corporation forbidding the reissue of any stock without the cancellation and surrender of the certificate or certificates to be reissued.

The said Wesley Dempster, from August 4, 1896, when the stockholders came into possession of the corporation, until April 3, 1899, controlled the corporation and held possession of its books, papers, securities and stock certificates. Until late in 1898, all the stock of the corporation was held by or was pledged to Wesley Dempster. Upon April 3, 1899, the stock of the corporation, being then released from all obligations to said Wesley Dempster, and by the discharge by the company of all the obligations so assumed by said Wesley Dempster, and all but 50 of the shares so purchased from Furber and Turner and placed in said Wesley Dempster's name having been cancelled, a stockholders' meeting was held, at which a new board of managers was elected and the affairs of the corporation taken out of the control of said Wesley Dempster. Said new board of managers thereafter investigated the management of the corporation when under the control of said Wesley Dempster, and instituted this proceeding by the corporation.

The bill prays for a discovery and accounting; that the defendants deliver up to be cancelled all certificates of stock improperly obtained or held by them or wrongfully issued to them, or either of them, and especially that said Wesley Dempster be decreed to deliver the certificates for 250 shares of stock of the present issue purchased by the corporation from said Furber and Turner, and now wrongfully and fraudulently held by said defendant; that said Charles W.

Dempster and Wesley Dempster deliver up the shares of stock so wrongfully purchased by them from former holders in violation of the agreement of the stockholders that it should be purchased by and for the benefit of the corporation—the complainant offering to do equity by paying the purchase price for said stock, with interest thereon, less dividends received by the defendants—and that said Wesley Dempster be required to account for the dividends received by him on said 250 shares of stock.

Appellees answered said bill, specifically denying all alleged wrong doing and admitting in substance the statements of the bill in respect to the history of the litigation instituted and carried on by the stockholders of the Cemetery Company. They allege that during the proceeding the said Wesley Dempster took the matters in controversy in hand at the request of the parties to the stockholders' agreement, and that his services extended over a period of about six months and consumed a great deal of thought and urgent labor; and said Wesley Dempster says "that it was not a part of his agreement that he should not be paid for his services," and that it was never contemplated or expressed that he should do the work and pledge his credit without compensation. They allege that said Wesley Dempster used his own funds and pledged his own estate and credit in the sum of about \$70,000 for the purpose of bringing about a satisfactory settlement; that this was done while the affairs of the company were in such a pecuniary condition that it was necessary to procure some person of business ability and large estate to place the company in a condition to make the respective interests of the parties to the agreement of fair value; and that by the acts of said Wesley Dempster the interests of the respective parties to said agreement did greatly increase in value.

The defendants deny that they wrongfully purchased for their own account said outstanding shares of stock in violation of any agreement among the parties to the stockholders' syndicate. They deny all charges of improper action by said Wesley Dempster to control the corporation. They contend

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that "said complainant company and the officers and members of the board, in consideration of the valuable services rendered said company by said Wesley Dempster, caused to be issued to him in compensation therefor fifty shares of stock, which, at that time, were of small value compared with the services rendered." They allege that said complainant is freed and discharged from all obligations to said Wesley Dempster, but allege that it discharged itself therefrom by paying to him said 50 shares of stock, represented by 250 shares of the present issue; and that said Wesley Dempster is now the absolute owner of said 250 shares. They further allege that, at the time said 50 shares were issued to said Wesley Dempster, they were of the value of \$5,000, and were not excessive compensation for the services rendered.

The defendants admit that they purchased several small blocks of outstanding stock for their own account; but allege that they had a perfect right to do so, there being no obligation or agreement to the contrary.

The cause was referred to a master in chancery to take proofs and to report the same, with his opinion on the law and the evidence. The master's report was filed July 6, 1903, in which he recommends that the bill be dismissed for want of equity. The objections to such report were duly filed as exceptions thereto, and were fully argued before Judge Tuley of the Circuit Court in the month of October, 1903. After holding the case under advisement for several months, the learned chancellor handed down the following opinion:

"Upon a revision of the evidence and arguments in this case, I have come to the conclusion:

That if ever there was a case where, upon equitable principles, a person should be compensated for services rendered a corporation, there being no express agreement made beforehand to pay for the same, this is one.

There had been thirteen or fourteen years of litigation between Lansingh and other parties he represented, called the 'Syndicate,' holding 'certificates of interest' in the property of

the Rosehill Cemetery Company, which, in 1895, resulted in a final decree, holding, among other things, that the holders of such certificates of interest were equitable assignees of the stock of the corporation, and that they were equitably entitled to redeem such stock, which had been placed in the hands of Judge Blodgett as trustee, to secure the payment of the mortgage indebtedness of the corporation. Each certificate represented one 1/1,500 interest in the property of the corporation.

The Cemetery Company started its operations upon land heavily mortgaged on the day of, in the year 1859, entering into an agreement with the holders of the mortgage indebtedness by which it was allowed to carry on the cemetery upon certain conditions, and placed all of its stock in the hands of a trustee to secure the payment of the mortgage indebtedness.

The certificates of interest were sold in the open market for the means with which to carry on the operations of the company, and certified on their face, in substance, that, on the return of the pledged stock to the corporation, the holders of a certificate of interest would be entitled to a *pro rata* division of the returned stock.

The decree of this court, among other things, in substance, held, that the complainant was entitled to an accounting as to matters charged in the bill to ascertain whether the said mortgage debt had been paid and discharged.

The decree was affirmed by the Supreme Court, except in one or two particulars, and remanded for further proceedings in accordance with an opinion covering over sixty pages. The contest was a long and bitter one, and when the case was returned from the Supreme Court and redocketed, the question of an accounting running through a period of more than twenty years (together with other certain complications not necessary to specify) gave promise of an extended and expensive further litigation.

The case in the Supreme Court is found in the Illinois Supreme Court Reports, Vol. 154, *Lansing v. Higgins*, 301 to 393.

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Van H. Higgins, the principal owner of the mortgage indebtedness, died before the case was redocketed in this court, and Furber (who owned the remainder) for himself and Mrs. Higgins, administratrix and legatee, made overtures to the 'syndicate' looking to an amicable accounting and settlement of all their difficulties, but without any success whatever.

In January, 1896, Wesley Dempster (who was the holder of certain certificates of interest, and who, refusing to enter into the syndicate agreement, had contributed to the *pro rata* share of its expenses), was called upon by Furber to see if he, Wesley Dempster, could not bring about an amicable accounting and settlement between the parties litigant.

He communicated with the syndicate and was urged by it to undertake a settlement. It appeared that the syndicate had, in its numbers, no one who had such financial position as to obtain the confidence of Furber, while Wesley Dempster, by his superior business qualifications and financial ability, was enabled to successfully carry on the negotiations for a settlement. Wesley Dempster met with Furber almost daily for over eight weeks, and was in constant communication and consultation with the syndicate.

The litigation had been managed and directed by Lansingh, who had an agreement with nearly all of those who constituted the syndicate, for the payment to him of one-third of the amount realized by the litigation, but what was known as the syndicate (at the head of which was Lansingh) controlled practically all the outstanding certificates of interest at the time that the settlement was arrived at between Furber and Wesley Dempster, all but 45 shares.

In March, 1896, a tentative agreement as to a settlement was arrived at, but great difficulty was found in getting the same into shape so as to bind the Rosehill Cemetery Company, the mortgagees and the holders of the certificates of interest.

There was then no existing board of directors of the Cemetery Company. While those holding certificates of interest were the equitable owners of the stock, they could not vote

the same, because the legal title to the same was in Blodgett as trustee for the owners of the mortgage indebtedness, and the holders of such certificates (which, as I have stated, were practically all in the syndicate) could not elect a new board of directors without the consent of the mortgagees and trustee.

Furber was evidently distrustful of the syndicate with whom he had found it impossible to come to any understanding or amicable settlement.

An agreement in writing as to the accounting and settlement between the Higgins-Furber interest and the owners of the certificates of interest, was not consummated until July, 1896. Under this agreement, Wesley Dempster was to take the practical management and control of the corporation until the \$195,000 (which was the amount arrived at to be paid to the Higgins-Furber interest) had been fully discharged.

A meeting of the stockholders was called and held in August, 1896, for the election of a board of directors of the Cemetery Company, at which election Lansingh was elected president, and Wesley Dempster secretary and treasurer. The trustee holding the pledged stock did not attend such meeting.

September 14 a resolution was passed by the board of directors, authorizing the issue of 50 shares of stock to Wesley Dempster in consideration for the services referred to.

It appears there was then no treasury stock in the treasury of the company, and it is apparent from the resolution that it was contemplated that the stock should be issued when received by the corporation.

A certain 108 shares of stock were subsequently turned over to the corporation by the Higgins-Furber interest, and of this 108 shares of stock were subsequently issued, 50 shares to Wesley Dempster and 50 shares to Osborne, the attorney, under a resolution passed by the board of directors the 28th of August preceding, and also shares were issued to Pettibone, also one of the attorneys. All of these shares of stock appear to have been issued at one and the same time.

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Osborne was a stockholder at the time that resolution was passed to issue the 50 shares to Wesley Dempster.

There is evidence tending to show that Lansingh, C. J. Dempster and others, members of the syndicate, declared during the progress of the negotiations between Furber and Wesley Dempster, that the latter ought to be well paid for his services.

The evidence tends to show that the principal managing members of the syndicate, if not all the members thereof, had knowledge of the negotiations as they were carried on and were much pleased with the successful efforts of Wesley Dempster. They might well be, as it is evident that his services were valuable to all those having any stock (certificates of interest) in the Cemetery Company.

It is a fair inference from the evidence that no one, except Wesley Dempster, could have effected so prompt and advantageous a settlement.

The value of the stock at the time it was voted to Wesley Dempster was about \$100 a share, but even had it been worth double that amount, it would not have been excessive compensation under the circumstances, for his valuable services.

In the passage of the resolution there appears to have been no concealment or secrecy about it. The master has found, in substance, that there was no collusion or fraud, but that it was the voluntary action of the directors under the belief that it was a just and fair compensation to Wesley Dempster for the services which he had performed.

It does not appear from the evidence that there was any influence brought to bear by Wesley Dempster, or any influence of any kind used in any way whatever to control the actions of the board in passing the resolution. There is some effort to show that Lansingh was coerced into voting for the resolution, and that Fitcher (one of the directors who, pending the negotiations, had bought a certificate of interest at the suggestion of the syndicate) did not fully understand the effect of his act, but, in the light of all the evidence, the same is not worthy of serious consideration.

The act of the board was only a recognition of the fact that a fair compensation was due Wesley Dempster for the benefits he had conferred upon the actual owners of the corporation—holders of the certificates of interest—in bringing about a settlement, whereby and without further litigation they could come into control of the corporation at once, instead of being forced to wait until an accounting running through a period of more than twenty years could be had. They were, under the settlement agreement, let into control before the mortgage debt was paid, but, under the terms agreed upon, the mortgagee's interests were protected.

The syndicate, which then embraced practically all the holders of certificates of interest, except about 25 shares, had succeeded in obtaining control of the corporation after nearly fourteen years' litigation, and it is not surprising that they felt very grateful to Wesley Dempster for his services.

It appears that the 50 shares of stock was voted to Mr. Osborne, the attorney, about two weeks before action was taken as to the stock voted Wesley Dempster, but both were issued at the same time. Osborne was the solicitor of the syndicate and performed great and valuable service in the litigation referred to, but, like Wesley Dempster, he was not employed by the corporation. At the time the services were rendered by each, Osborne and Wesley Dempster, the corporation was in adverse control; they could not have made any agreement with the corporation for the services that were rendered, as those services were directly adverse to the interests of those in control of the corporation.

As a compensation for the benefits received, the amount voted to each, Dempster and Osborne, was very reasonable, in my opinion, and they were each equitably entitled to receive the same, whether they could have maintained an action at law to recover for the services rendered or not.

It appears that the business of the corporation was so well and successfully managed by Dempster that in the fall of 1899 the indebtedness due the Higgins and Furber interest was fully paid, and the mortgage was discharged. The holders of the certificates of interest then became not only the

equitable owners of the stock of the Cemetery Company, which had been placed in the hands of Blodgett as trustee to secure the payment of the mortgage, but also became the legal owners of the pledged stock, and then, and not before, became the absolute and only stockholders of the Cemetery Company, with full power to control the same as such.

Upon coming into such full and absolute control, a resolution in effect repudiating the prior action of the board of directors of September, 1896, was passed, and in accordance with that resolution this suit was commenced by bill filed the 4th of December, 1899, to compel the return of the 50 shares of stock voted Wesley Dempster, and also to make him account for certain so-called 'outstanding shares' not owned by the syndicate which Wesley Dempster purchased at different times after he commenced his negotiations with Furber.

As to the outstanding shares of stock, it is sufficient to say that the weight of evidence is against the contention of complainants that there was any understanding or agreement that such outstanding shares should be purchased by the company or for the company or for the syndicate, and that as to such outstanding shares so purchased by Wesley Dempster, he was under no legal or moral obligation to buy or hold the same for the benefit of the company or the syndicate.

Therefore, the only question remaining in this case is, should Wesley Dempster be decreed to return the 50 shares of stock to the corporation.

Upon the hearing, I stated that I was inclined to the opinion that the directors of the corporation were without power, in the absence of a contract having been entered into for his services, to vote him the 50 shares of stock in September, 1895. Upon a more elaborate consideration of the evidence and of the authorities, and considering the very peculiar condition of the corporation and the syndicate, and their relation to each other, and considering the status of the litigation then pending in this court, I am inclined to doubt whether this case falls within the rule referred to. 48 Law Rep., Note A 386, and cases cited. At the request of the court, counsel have furnished briefs as to the evidence bear-

ing upon the question of the ratification and acquiescence of the stockholders (owners of certificates of interest) and the acts of the directors, and I have concluded that, whether or not the act of the directors in voting the 50 shares of stock to Wesley Dempster was legal or not, it was one which could be ratified by the stockholders, and one which the stockholders might be estopped to question by reason of their own acts in connection with the passage of the resolution or in connection with the rendition of the services for which the stock was voted. And also that they might be estopped by laches in asserting their right to question the act of the directors, even if the same was illegal.

I am satisfied that the evidence fully justifies the finding of the master, 'that the vote of 50 shares of stock to said Wesley Dempster as compensation for said services, was made of record on the minutes of said meeting of said September 14, 1896; was open to the inspection of all stockholders, and was, in fact, known to all but the owners of a few shares outstanding, and which shares were shortly thereafter purchased by those who had participated in and who had knowledge of said transaction, and that said 50 shares of stock were so conveyed to said Wesley Dempster by said managers without protest on the part of any stockholder, nor was any adverse action taken or protest made until November, 1899, when more than three years had elapsed, a protest was entered of record by R. F. Pettibone against said action. Mr. Pettibone was a stockholder and had acted as attorney and legal adviser of Mr. Lansingh and his associates, and, with his associate counsel, was paid for his services to said Lansingh and his associate by said corporation, in part, by 15 shares of its stock on or about August 26, 1896, and had full opportunity to know what action had been taken in the matter of the stock voted to said Wesley Dempster.

It is true that both Osborne and Pettibone deny they knew of the passage of that resolution at the time of its passage, but their statement as to *when* they first knew of the passage of said resolution is so indefinite as to raise the presumption

(taking into consideration the evidence bearing upon that knowledge) that they must have known of the same within a very few days, and probably within 24 or 48 hours after its passage.

It is not necessary that a stockholders' meeting should be held in order to bind or estop the stockholders in questioning an illegal act of the board of directors. (167 Ill. 549; 165 Ill. 369; 104 Ill. 462; 93 Ill. 153.)

In this case, the directors, Lansingh and others, voted as directors at the meeting of September 14, 1896, in favor of the resolution voting the 50 shares of stock to Dempster. The vote appears to have been unanimous and the directors, with one exception, were stockholders, and, including their own stock and that which they represented, they represented practically all the shares of the holders of the certificates of interest, who, as I have remarked, were the real owners of the corporation and its stock. It makes no difference, except as to creditors, that these directors voted as directors and not as stockholders. They were both stockholders and directors.

Stockholders (leaving out the question of the interest of creditors) are the owners of the corporation; they are the *cestui que* uses for whom the corporation is trustee, and should be estopped by their own acts where any other *cestui que* would be estopped to question the act of his trustee.

But in this case there is no question as to the rights of creditors. The corporation was a solvent corporation and the owners of the certificates of interest were, in fact, the only parties interested in, or damaged, if any damage there was, by the act of the directors.

The stock called the outstanding stock has all been acquired by Wesley Dempster, except a few shares which were acquired by persons who either participated in or acquiesced in the alleged illegal act, and none of the holders of said outstanding stock appear to be seeking to overturn or repudiate the act of the directors in voting the 50 shares of stock.

This suit is brought by the corporation in behalf of, and as representative of, all the stockholders. It is not brought

by, nor could it be brought on behalf of, or by, part of the stockholders. If this stock is returned to the treasury of the corporation, the directors, who were large shareholders and voted for the illegal act complained of, would then be allowed to benefit by their own alleged wrong-doing.

The syndicate that derived such great benefits from the services of Wesley Dempster would be enabled (through the use of the corporation entity as a litigant) to undo an act which they were in equity bound to do, and which, with full knowledge, they acquiesced in and in equity should be estopped from questioning.

I can discover no principle of pleading or practice which would enable the court upon this bill to grant a decree in this case to any innocent stockholder, if any there be, who did not either participate in the illegal act or acquiesce in the same, or who is not in equity estopped from questioning the same by reason of laches in asserting his rights.

If there are any innocent stockholders, a decree dismissing this bill would be no bar to an action by them against the guilty directors.

There are a great many exceptions in this case, but I do not consider it necessary to review each one, as the master has correctly decided all the main questions in the case in favor of the defendant, Wesley Dempster. The equities of the case are so strongly with the defendant, Dempster, that any doubt upon the question as to the authority of the board of directors to pass the resolution voting him the 50 shares of stock should be resolved in his favor.

It will, therefore, be ordered that a decree be prepared overruling each and every exception to the master's report, confirming the master's report, and dismissing the bill, as recommended by him, at complainant's costs, for want of equity."

We have listened to the arguments of counsel for the respective parties hereto, and have examined their printed briefs and arguments, and have come to the conclusion that the opinion of Judge Tuley states the facts and the deduc-

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tions to be drawn therefrom so clearly and so correctly, that we cannot do better than to adopt it as the opinion of this court, which we now do.

The decree of the Circuit Court is affirmed.

Affirmed.

**Archibald Goode v. Illinois Trust & Savings Bank,
executor.**

Gen. No. 11,998.

1. JURISDICTION—*when question of, arising from absence of parties, cannot be raised.* The question of the jurisdiction of the court to hear an appeal from a justice of the peace, arising from the absence of one of the defendants, cannot be raised by another defendant who has voluntarily entered a general appearance in the cause, and this is especially true where such appearing defendant has entered into various stipulations in the cause and does not seek to raise the question until the cause has reached the Appellate Court.

2. IMPLIED CONTRACT—*what does not create.* An implied contract, to pay for work done on the demised premises, does not arise from the mere fact that the landlord has seen the workmen engaged in making repairs thereon.

Action commenced before justice of the peace. Appeal from the Circuit Court of Cook County; the Hon. JULIAN W. MACK, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed June 15, 1905.

Statement by the Court. Goode recovered a judgment for \$58 and costs before a justice of the peace against Flora D. Hill (impleaded as Mrs. Henry L. Hill) and P. L. Austin for work done and material furnished by Goode in making certain repairs upon a building belonging to Mrs. Hill and in the possession of Austin as tenant.

Mrs. Hill filed her bond in and perfected an appeal to the Circuit Court. Pending the appeal she died, and the Bank was made party defendant as her executor. Austin did not appeal, nor was he summoned, nor did he enter his appearance in the Circuit Court. The case was submitted to the court upon the following agreed state of facts:

"On May 1, 1900, P. L. Austin leased the premises at No. 244 Wabash avenue, in the city of Chicago, from Mrs. Henry L. Hill for a term of years. Said lease provided that Austin should make any changes or alterations in said building as might suit his convenience, and that said Austin should be allowed two or three months' rent therefor. Archibald Goode has been a contractor and builder in the city of Chicago for a period of over thirty years. On or about the 13th day of July, 1900, Austin went over the premises heretofore mentioned with said Goode, and employed him to do certain work thereon. Among other things he was to cut out certain brick work at the foot of the rear stairs, and change what had been a window so as to put in a door and transom, making an entrance to the building from Illinois court. He also had to put in some sashes, and furnish certain material, such as doors, sashes, base boards, moulding, locks, etc., and in addition thereto to do certain brick work and plastering. This work was easily worth \$59.00. On the 14th day of July said Goode put his men to work on the job in his shop, making the necessary doors, sashes, etc.; and on the 15th he went to the premises with W. H. Kersey as an assistant and began cutting out brick work and putting in some of the material which had been prepared in his shop. He also worked on the 16th and part of the 17th, he and his helper each putting in a total of 26½ hours. During the progress of the work Mrs. Hill was in the building at frequent intervals, and frequently saw Goode at work, but never made any objection or said anything to him. He knew it was Mrs. Hill because Austin pointed her out to him as the woman who owned the property. Mr. Shirra, an attorney and agent for Mrs. Hill, was present on the 15th and once or twice thereafter during the progress of the work, but did not at this time say anything to Goode about the work he was doing. On the 17th day of July Shirra said to Goode: 'Don't do any more work here.' When Goode asked him why, he said that he was the agent of the building, and that there was a law suit pending between Mrs. Hill and Austin in which they were trying to force Austin

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out, and that Goode had better not do any more work, as he would not be paid for it. Goode asked him: 'How about the work already done?' Shirra said that the proprietor of the Saratoga Hotel was going to take the premises, and when he took them he might want some further work done, and that when this party took possession, he, Shirra, would see that Goode was paid for what he had done, but that he must not do any more. Shirra then offered Goode \$5.00 for the key to the premises, which was refused. Shirra then employed Goode to nail up the doors, windows, etc., and paid him \$5.00 for doing this. On August 28th demand was served on Mrs. Hill and Austin by one Jesse Joseph for Goode. After this time Goode called upon Shirra as Mrs. Hill's agent several times, and while Shirra promised to pay, he each time put Goode off, never refusing to pay until the time suit was started. Suit was started by Archibald Goode before W. T. Hall, J. P., and recovered judgment for \$58.00 and costs, from which judgment the defendant appealed to the Circuit Court, where it is now pending."

The court found the issues for appellee and entered judgment against appellant for costs; who then perfected this appeal.

BELL & HODGES, for appellant.

WALLACE E. SHIRRA, for appellee; THOMAS H. ROBINSON, of counsel.

MR. PRESIDING JUSTICE BALL delivered the opinion of the court.

Appellant contends that it was error for the Circuit Court to hear and to dispose of the cause in the absence of Austin, one of the defendants in the justice court. This contention is based upon the provisions of section 70 of the Justice of the Peace Act of 1872. This section is omitted from the revision of that Act in 1895, which is entitled "An act to revise the law in relation to justices of the peace and constables." The revision in 176 sections purports to cover the

entire subject-matter contained in its title. By article ten of that act, full provision is made for appeals.

It is not necessary in this case for us to decide that said section 70 is now the law of this State,—a position we are unwilling to take,—for the reason that appellant by his counsel entered his general appearance in this cause in the Circuit Court. When the case was called for trial he joined in a stipulation by which the matter in dispute was submitted to the court, without a jury, for determination; and also entered into a stipulation as to the facts; and then took part in the trial. At no time in the Circuit Court did appellant raise the question of jurisdiction growing out of the fact that Austin was not then in court.

The Circuit Court had jurisdiction of the subject-matter of the litigation. It obtained jurisdiction of the person of appellant by his voluntary general appearance. He thus conferred upon that court the right to proceed to hear and to determine the controversy in so far as his rights were concerned. Had he desired to raise the question of jurisdiction, he should not have appeared, or should have limited his appearance to the objection against the jurisdiction of the court. It is too late to raise that question for the first time on appeal. *Herrington v. McCollum*, 73 Ill., 479; *Brownmark v. Livingston*, 100 Ill. App. 474; *Anderson v. Moore*, 145 Ill. 61.

The second contention of appellant is that the verdict is contrary to the evidence. We do not so read the statement of facts. Appellant's contract was made with Austin, the tenant, and not with Mrs. Hill, the owner of the building. It is true, she agreed with Austin that he might make such repairs as he saw fit and she would allow him two or three months' rent therefor, but this agreement did not make Austin her agent to bind her to pay to Goode or to any other third person the cost of any repairs ordered solely by Austin. The mere fact that Mrs. Hill saw Goode at work on these repairs did not render her liable therefor. There is nothing to show that Mr. Shirra had any power to bind Mrs. Hill, or that she ever knew of his promise or adopted it. Nor

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does it appear that such repairs were of any permanent benefit to the premises.

The judgment of the Circuit Court is affirmed.

Affirmed.

**James Foster v. The People of the State of Illinois, for
use of Peter Apolodimas.**

Gen. No. 12,005.

1. ACTION OF DEBT—*when plaintiff bound to prove every necessary allegation of declaration in.* Where the plaintiff in such an action joins issue upon a plea of *nil debet*, he is bound to prove every necessary allegation of his declaration, and this notwithstanding such plea is not a proper plea to such declaration.

2. TRANSCRIPT OF JUSTICE—*what sufficient proof of authenticity of.* The authenticity of a transcript of a justice's docket is sufficiently established, where the same lacks a seal, by the evidence of the justice issuing the same, that it is a transcript of his docket in the case in question.

3. CONSTABLE—*when bondsmen of, liable.* The bondsmen of a constable are liable for a levy made under an execution issued upon a judgment obtained upon a fraudulent return made by such officer.

4. CONSTABLE—*bondsmen estopped to deny official capacity of.* In an action upon a constable's bond, the bondsmen are not permitted to deny the official character of such constable.

Action of debt. Appeal from the Circuit Court of Cook County; the Hon. LOCKWOOD HONORE, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed June 15, 1905.

E. H. MORRIS, for appellant.

STEELE, MELOAN & THOMPSON, for appellee.

MR. PRESIDING JUSTICE BALL delivered the opinion of the court.

This was an action on a constable's official bond. The declaration set forth the giving of the bond in question by Ernest H. Ricker, appellant, and James C. Daly, for \$10,000 and the conditions thereof; that June 18, 1900, a suit was commenced by one Hillinger against John Apolodimas and

Peter Apolodimas before R. M. Scholes, a justice of the peace; and that on said date a summons was issued in said suit by said Scholes, justice of the peace, summoning said John Apolodimas and Peter Apolodimas to be and appear, etc.; that said summons was delivered to said Ernest H. Ricker as constable to be served; that said Ricker falsely made return of said writ as served on said John and Peter by reading the same to them June 22, 1900; that said return was false and Ricker did not at any time in any way serve the said summons upon Peter Apolodimas; that said Peter did not know of said proceedings until July 28, 1900, when said Ricker came to the place of business of said Peter and made a levy upon the goods and chattels of said Peter and his partner under an execution issued by said justice upon a judgment for \$25 and costs, which had been rendered in said proceedings, and which said Ricker knew was void by reason of his false return; and that in order to save his goods and chattels said Peter was obliged to pay and did pay to said Ricker the sum of \$142, etc.

All of the defendants pleaded *nil debet*, and a special plea that said Ricker did serve said summons on said Peter Apolodimas, etc.

Issue was joined upon these pleas. The cause was tried, and the jury returned a verdict finding the issues for the plaintiff, the debt to be the sum of \$10,000, and the damages to be the sum of \$200. Judgment was entered upon this verdict for debt \$10,000, and for damages \$142. From the entry of this order appellant, one of the sureties, brings the case to this court.

A particular breach of the bond in question was alleged in the declaration. A proper plea to such a declaration is one denying the particular breach thus assigned. The plea of *nil debet* which was first filed herein was not the proper plea. However, appellee did not see fit to demur to it, but joined issues thereon. By so doing appellee bound itself to prove every necessary allegation of its declaration. *People v. McHatton*, 2 Gilm. 732; *Caldwell v. Richmond*, 64 Ill. 30; *Mix v. People*, 86 Ill. 329; *Kilgour v. Drainage Com.* 111

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Ill. 342. The legal situation is not changed by the fact that the defendants afterwards filed a special plea alleging that Ricker did serve said summons upon appellee, etc. Under our statute a party may plead as many matters of fact in several pleas as he may deem necessary for his defense. The filing of the special plea here did not waive the general issue of *nil debet* then on file.

This case turns upon the truth or falsity of a return made by Ricker as constable upon a summons placed in his hands for service by Justice Scholes issued in a suit then pending before said justice. That return, which is set out in full in the transcript of the justice, reads: "Personally served the within writ by reading same to the within named defendants, John Apolodimas and Peter Apolodimas, in my County this 22nd day of June, 1900. E. H. Ricker, Constable." Appellee swears that the constable never served that summons upon him; and there is no evidence to the contrary.

But it is contended that the justice transcript lacked a seal, and therefore should not have been admitted in evidence over the objection of appellant. It is a sufficient answer to this contention to say that the justice of the peace who issued the transcript was called as a witness, and being shown the transcript, testified: "The paper which I hold in my hand is a transcript from my docket in the case of Philip Hillinger v. Peter Apolodimas." This evidence, which was not objected to, was sufficient proof of the authenticity of the paper. The provisions of the statute are not exclusive. *Willoughby v. Dewey*, 54 Ill. 268. Indeed, the statute provides that such papers may be proved by copies examined and sworn to by credible witnesses. *R. S. Hurd*, 1903, Section 17, Chapter 51. The transcript shows that Justice Scholes had jurisdiction of the subject-matter of the Hillinger suit, and that in such suit in the usual course of his duty as a justice he issued a summons against appellee, and gave it to said Ricker as constable for service. It also shows that Ricker returned said summons as served upon appellee June 22, 1900, that judgment was rendered in said suit in favor of Hillinger and against appellee and his brother John, and

that an execution based upon that judgment was issued to said Ricker for service June 26, 1900.

It is objected that it is not shown that Ricker was acting under the execution in the Hillinger case when he invaded the premises of appellee and threatened to take out the goods therein situate. It is in evidence, and uncontradicted, that when Ricker made demand on appellee for the payment of the judgment he handed to appellee a copy of an execution. When shown this copy Justice Scholes said: "I don't know who made that paper; it is not mine." Q. "Is that a copy of that execution?" A. "Yes, I guess it is." This evidence with that given by appellee upon the same subject, rendered the execution competent testimony in this case.

The unlawful act of Ricker in returning said summons as served by him upon appellee, when he had not served him and had never seen him prior to the levy of the execution, wrongfully obtained by reason of such fictitious service, was an act which was provided against by the condition of the bond sued upon. By joining in the execution of such bond appellant bound himself that Ricker should faithfully discharge the duties of his office as constable, and, if Ricker failed to do so, that appellant, in a proper case, would respond in damages.

There is no merit in the contention that, as the declaration alleges "that Ernest H. Ricker had been duly appointed a constable in and for the Town of Lake View," while under the statute all constables must be elected, there is no sufficient allegation as to the alleged official position of Ricker. In this regard the declaration but follows the recital of the bond in suit. Again, in an action upon a constable's bond, the obligees are not permitted to deny that their principal is constable. Upon that question the execution of the bond estops them. *Shaw v. Havekluft*, 21 Ill. 128.

Believing that substantial justice has been done in this case, and that no reversible error appears in the trial, we affirm the judgment of the Circuit Court.

Affirmed.

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Gen. No. 11,964.

1. **INSURANCE AGENT—when entitled to commissions.** Where an insurance agent during his employment by a company has obtained an application for a particular amount of insurance, he is entitled to his commission, notwithstanding after his resignation the form of policies applied for are changed, where it appears that such agent was the procuring cause for the placing of such insurance.

2. **INSURANCE AGENT—when not entitled to commissions.** Where an agent of an insurance company, employed on a commission basis, procures an application for insurance and subsequently another agent of the company induces the applicant to increase the amount of the application, the former agent is not entitled to his commission on the additional insurance thus procured.

3. **REMARKS OF COUNSEL—when, not ground for reversal.** The remarks of counsel made to a witness in the presence of the jury, to the effect that he had no regard for an oath, *held*, not ground for reversal where objection thereto was sustained and the court instructed the jury to disregard all remarks of counsel.

Action of assumpsit. Appeal from the Circuit Court of Cook County; the Hon. LOCKWOOD HONORE, Judge, presiding. Heard in this court at the October term, 1904. Affirmed upon *remittitur*. Opinion filed June 15, 1905. *Remittitur* filed and judgment affirmed June 19, 1905.

Statement by the Court. The appellee sued appellant in assumpsit for commissions which he claimed to be due him as a solicitor for insurance on the life of George P. Braun, and recovered judgment for the sum of \$5,684.10. Appellee, at the time of the transactions hereafter mentioned, had been engaged as a solicitor for life insurance for a number of years, and had been in the employ of Mutual Life Insurance Company during all the time he was such solicitor, except three or four months. He became acquainted with George P. Braun in the year 1890, and in the year 1900 solicited him to apply for insurance on his life, with the result that he procured from Mr. Braun an application to the Mutual Life Insurance Company, of New York, which that company declined, after which appellee brought the notice of Mr. S. M. Pearman, who at that time was agents' director of appellant at appellant's branch office

in Chicago, to Mr. Braun's desire for insurance. Mr. Pearman testified that, by appellee's request, he called on Mr. W. B. Carlile, the manager of the Chicago agency of the Mutual Life Insurance Company of New York, and stated to him, as Pearman testified, that Rilling had told him that he, Mr. Carlile, would furnish him with all the data of the history of the Mutual Life with the Braun application, and show to him Braun's correspondence with the company, and that Carlile said that was correct and that Rilling was very much disappointed that the Mutual Life did not issue the policy applied for, that he expected the commissions and the company expected to wipe out some indebtedness of Rilling from the commissions, and that he, Carlile, would appreciate any interest Pearman would take in the matter on Rilling's behalf, as it would do him and the Mutual Company a good turn, and Pearman told Carlile that he was interested in a \$100,000 application, and would do all he could to get the case through, and would fully protect Rilling by giving him a contract. Mr. Carlile testified that Mr. Pearman said he wanted the information so that he could protect Rilling's rights with his company, and I said he controlled the business for the Mutual Life, and that it was with my knowledge that he was taking the Braun policy to be issued for \$100,000 to the New York Life. Pearman said he would shut out any other agent for all time, after Rilling signed his name to the bottom of the application. Mr. Pearman denied positively having said that he would protect Rilling for all time, or words to that effect. Mr. Pearman then returned to his office and a contract was executed between the appellant and Rilling. The contract is dated July 16, 1902. By it Rilling is appointed agent for appellant, "for the purpose of canvassing for applications for insurance on the lives of individuals, and of performing such other duties in connection therewith as may be required by the officers of said party of the first part," etc. The contract contains numerous provisions, among which are provisions fixing rates of compensation or commissions to solicitors, which last it is unnecessary to refer to, as the rate claimed

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by appellee, viz: 50 per cent of the first or cash premium, does not exceed that fixed by the table of rates in the contract. The contract between appellant and appellee seems to be the usual form of contract between appellant and its canvassers or solicitors.

It is not controverted that the Mutual Life Company and appellant knew that appellee executed the contract for the sole purpose of procuring an application from Mr. Braun to appellant for life insurance, and that he would still remain in the service of the Mutual Life Company. July 17, 1902, the next day after the execution of the contract above mentioned, Mr. Braun, through appellee, made application to appellant for a \$100,000 fifteen-year accumulation policy. No policy was ever issued by appellant to Mr. Braun in accordance with the terms of this application. Appellee executed the following on the day of its date:

"Chicago, Ill., October 11, 1902.

New York Life Ins. Co.,

New York, N. Y.

Gentlemen: Referring to the agreement that has been in existence between your company and myself, I wish to avail myself of the clause which gives me the privilege of terminating such agreement. Please have same take effect immediately. Please construe this as my resignation.

Yours truly,

C. W. RILLING."

There is a conflict in the evidence as to the circumstances under which this document was signed by appellee. After Rilling sent to appellant Mr. Braun's application for a \$100,000 policy, appellant, as appears by appellee's testimony, made a counter proposal to issue to Mr. Braun a ten-year endowment policy for \$10,000. Mr. Pearman testified that October 11, 1902, he sent for Rilling to come to his office, which he did, and he asked Rilling if he was through trying to get Mr. Braun to go to New York, and through with the effort to get Mr. Braun to accept the offer the New York

Life had made. "He said he was, and I said that my purpose in having him come to the office was to fully protect him, and that if he was ever going to do anything with the Braun case, to do it then, and if he was going to give up and abandon the case and not do any work for the New York Life, I would suggest that he should not incumber its books by being carried as an agent, and he said: 'I am absolutely through, Dr. Pearman, and I think myself it is best to resign.' His resignation was then made up and he signed it."

L. A. Greenwood testified that in 1902 he was the assistant of Dr. Pearman, in appellant's branch office in Chicago; that about two months after the Braun application was in he met Rilling and asked him what he was going to do about the Braun matter, and he said he didn't believe he would do anything about it; that shortly thereafter he again met him and told him they were anxious to know what he was going to do about the Braun case, and took him to Pearman's office, and there heard a conversation between Pearman and appellee; that Pearman told appellee that if he was going to do anything more about the Braun case, he must do it right away, and Rilling said he would not attempt to deliver the proposition which had been made by the New York Life, and Pearman said that if he would not make any effort to deliver the proposition, he should resign and leave way for some other man, that the business had been hanging fire for some time, that the New York Life had other agents in touch with Mr. Braun, and that if Rilling was not going to do anything more, he should step out of the way and let a man step in who would handle it. "Rilling, I believe, said that nobody could write Mr. Braun for insurance, that he controlled the business. The resignation was signed that day in my presence." Witness also testified that in the interview between Pearman and appellee there was nothing in the conversation about reservation of the Braun matter. Rilling, the appellee, testified, in respect to the conversation at the time he signed the resignation, that Pearman told him the appellant had offered Braun a ten-year endowment policy for \$10,000, which was its best offer, and that if he could get Braun to

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go to New York, or hold him till the chief medical examiner could come to Chicago, they had a good chance to get the policy appellee wanted, and that when Pearman asked him to resign, he told him he would so far as the contract went, but would not relinquish his rights to the Braun claim, and Pearman said it would not affect his claim for commissions, and also said that as soon as appellant could get its chief medical examiner to Chicago he would notify appellee, and he was to bring Braun to the office for examination, and that he did not tell appellee that if he was going to do anything about the Braun policy he should do it then.

Pearman testified that he had no further dealings with appellee after October 11, 1902; that he remained in the performance of the duties of his office in Chicago until about May 7, 1903, when he ceased to be connected with that office, and May 20, 1903, he sailed from New York for Europe. Pearman also testified that prior to the interview of October 11, 1902, he told Rilling that he had been to New York, and had tried to get appellant to issue a policy on Braun's application and was unsuccessful; that he had talked with appellant's vice-president and that there was a very marked prejudice against the case, by reason of the Mutual Life's rejection of Braun's application, and that the obstacle seemed to be that the company was not clear as to why Braun should have gone to Europe, taking a physician with him, and that he did not see how that could be overcome, and that Braun might go to New York and submit himself to the company's medical examiner there; and Rilling said he would make an effort to get Braun to go; that in three or four days after the last-mentioned conversation he again saw Rilling, and Rilling said that Braun would take no insurance other than that applied for, and that there was no use trying to get him to do so.

July 21, 1903, Braun made four written applications to appellant for four installment annuity policies of insurance on his life; one for \$20,000, payable on his death to his son, George P. Braun, Jr.; one for \$80,000, payable on his death to his wife, Martha E. Braun: one for \$40,000, payable to

his said wife, and one for \$60,000, payable to his daughter, Mabel Braun. The applications are signed, "George P. Braun" and are "Witnessed by W. Edwin Nichols, agent." Policies were issued to Braun on the four applications, for the amounts, and for the benefit of the persons, respectively, mentioned in the applications as beneficiaries. The numbers of the policies correspond with the numbers of the applications, and run from July 21, 1903, the date of the applications. Mr. Braun paid the first year's premium on all the policies, amounting in all to \$10,870. Appellee claimed 50 per cent of said amount as commissions.

O'BRYAN & MARSHALL, for appellant.

NEWMAN, NORTHRUP, LEVINSON & BECKER, and C. E. CLEVELAND, for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

Appellant's counsel contend that appellee's resignation, meaning the document executed by appellee October 11, 1902, is conclusive against any recovery by appellee. Clause 18 of the contract between appellant and appellee, of date July 16, 1892, provides that "either party hereto may terminate this agreement upon thirty days' notice." It is not questioned that appellee voluntarily executed the so-called resignation, and that appellant accepted it. The language of the resignation is, "Referring to the agreement that has been in existence between your company and myself, I wish to avail myself of the clause which gives me the privilege of terminating such agreement. Please have this take effect immediately." Plainly, the execution of this paper by appellee at once terminated his contract of agency with the appellant, and he was no longer appellant's agent for any purpose. He had no authority after October 11, 1902, to solicit or accept applications to appellant for insurance. This, however, is not conclusive of the question, whether if the company subsequently insured Mr. Braun, and such insurance was wholly or partly owing to appellee's services performed prior to the termination of the contract, he is or not

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entitled to compensation for such services. Appellee was employed by appellant solely because of his acquaintance with Mr. Braun, and his supposed influence with him, and because of the fact that he had been acting for Mr. Braun, in endeavoring to procure insurance on his life for the sum of \$100,000. He procured Mr. Braun to apply to appellant for insurance to the amount of \$100,000, and Braun, as is evidenced by his payment of the sum of \$10,870, the total of the first or cash premiums on the four policies subsequently issued to him, was able and willing to accept insurance to the amount of \$100,000, and pay the premiums on the same. We think, therefore, the questions whether the services performed by appellee, prior to the termination of his contract of agency, contributed in any degree to the subsequent insurance of Mr. Braun's life by appellant, and, if so, to what amount he is entitled as compensation for such services, were questions for the jury on the evidence. There is not a particle of evidence that appellee procured or had anything to do with the application of Mr. Braun for the four policies issued July 21, 1903, aggregating \$200,000 of insurance, and such evidence was not to be expected, because, as heretofore stated, appellee, after October 11, 1902, was no longer an agent of appellant to solicit insurance. Appellee, in his testimony, did not claim that after October 11, 1902, he made any effort to procure insurance from appellant on Mr. Braun's life. Mr. Braun testified that he signed the applications for the four policies by the request of Mr. Edwin Nichols, and that he never spoke to appellee about his, Braun's, talks with Nichols; that he had quite a number of conversations with Nichols on the subject, and that Nichols made an appointment with him in the office of the New York Life, in Chicago, and he, Braun, went over there and saw appellant's physician; that while he was making visits to appellant's office from time to time during three months, and up to the time he received the policies, he did not mention to appellee that he was having negotiations with appellant, and that, as far as he knew, appellee knew nothing of such negotiations. The application for \$100,000 insurance, procured

by appellee, was made July 17, 1902, and the applications for the four policies, aggregating \$200,000 insurance, are dated July 21, 1903. It is very evident that appellee did not influence Mr. Braun to apply for insurance in double the amount which he first applied for. The question therefore is, what his compensation should be, if anything. The declaration contains six special counts and the common counts, and in each special count it is averred that appellee procured Braun to apply to appellant for \$100,000 insurance on his life, and that appellant insured his life in the sum of \$100,000, and commissions on the cash and deferred premiums are claimed in the declaration; but on the trial appellee withdrew his claim for commissions on the deferred premiums, and stated, as his only claim, 50 per cent on the first premium, and the jury estimated appellee's compensation at 50 per cent of \$10,870, or \$5,435 and interest, and on remittitur of \$22.65 interest judgment was rendered for \$5,684.10. Appellee's counsel, in their argument, claim 50 per cent of \$10,870, the total first premiums on the four policies. This claim can only be made on the hypothesis that Braun's application for \$200,000 insurance was induced solely by appellee. It certainly was not induced by appellee prior to the termination of his contract of agency, and we think it equally clear from the evidence that it was not induced by him after such termination, when he was no longer the agent of appellant, and had no authority to act in its behalf. In *Leviness v. Kaplan* (Md. Ct. of Appeals), 59 Atlantic Rep. 127, Leviness was the general agent of the Bankers' Life Insurance Company, and employed Kaplan as a solicitor of insurance, and in November, 1900, Kaplan procured a Mr. Middendorf to apply to the Bankers' Ins. Co. for insurance to the amount of \$10,000. The application was postponed for six months by the medical director of the company, during which time nothing could be done either by the insurance company or Kaplan. In November, 1901, Mr. Middendorf met Charles F. Leviness, Jr., who was the son of the appellant and also an agent of the insurance company, and said to him that he had had some dealings with the insurance company, but

the company refused to accept him at the time, and that he would be glad to go ahead with the matter if it were then practicable and possible. Young Leviness then questioned him about his health, and the result was that Mr. Middendorf made a new application for a policy for \$20,000, which the company accepted. The suit was against the elder Leviness for commissions on the \$20,000 insurance, and he requested the trial court, sitting as a jury, to accept the following proposition, which the court refused: "That if the court does find for the plaintiff, that its verdict cannot be for the amount in excess of the commissions claimed on \$10,000, as to that item of the plaintiff's suit, and not upon the second \$10,000, if the court should believe that the plaintiff procured an application for \$10,000, and that the defendant, through another agent, procured the second \$10,000." The Court of Appeals, after discussing some questions, among which was the question whether the evidence tended to prove abandonment by Kaplan, say: "Even if the two questions above referred to be decided in favor of the appellee, he should not be allowed to recover commissions on more than the \$10,000 for which the original application was filed. The evidence shows that the application for \$20,000 was made at the suggestion of young Leviness. The testimony of the appellee is to the effect that he expressly limited the one he got to \$10,000. He said: 'It was policy to do it, although the fact seems to be that there was then that limit by the company.' But if there be no limit, then, according to the appellee's contention, if the policy had been issued for \$10,000, and young Leviness or some other agent had afterwards induced Mr. Middendorf to take another policy, the appellee was then entitled to commissions on the ground that his work was 'the procuring cause leading to' the second application. We have been referred to very few authorities on the subject, but in 16 Am. & Eng. Ency. of Law, 911, it is said: 'Where an agent of an insurance company, employed on a commission basis, procures an application for insurance, and subsequently another agent of the company induces the applicant to increase the amount of the application, the former agent is not

entitled to his commission on the additional insurance thus secured.' Citing *Brackett v. Met. Ins. Co.*, 18 Misc. Rep. (N. Y.), 239, 41 N. Y. Supp. 375. The principle thus stated seems to us to be just and eminently proper, and in this case, where the first application entirely failed, and a year after the first was filed a new application for double the amount was made, and accepted through another agent, there is still more reason for the application of the principle. If the appellee be entitled to recover at all, his recovery should therefore be limited to commissions on the amount of the original application."

See, also, *Brackett v. Met. Ins. Co.*, 41 N. Y. Supp. 375, cited by the court in the last case, which is directly in point, with the exception that the plaintiff in the case was still an agent of the company when the second application was made, while appellee was not.

Appellee's counsel base his claim for compensation on clause 20 of the contract of agency, which provides: "It is agreed that said party of the second part shall be allowed, under this agreement, the following compensation only, unless otherwise expressly stipulated in writing, namely, a commission on the original cash premiums for the first year of insurance, and, subject to conditions given in paragraph C of this section, upon the second premiums, which shall, during his continuance as said agent of said party of the first part, be obtained, collected, paid to and received by said party of the first part, on policies of insurance effected with said party of the first part (written with 15, 20, 25 or 30 year accumulative periods) by or through said party of the second part," etc. How can it be said that the policies for \$200,000 were exclusively effected with appellant by or through appellee, in the face of the fact that he knew nothing of the negotiations between Braun and appellant for the \$200,000 policies left after the policies were issued? In passing, we may say that we do not concur in the construction of appellant's counsel, that the words of the clause in question—"which shall, during his continuance as said agent, be obtained," etc.—include first year or cash premiums. Our

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construction is, that these words apply solely to the deferred premiums. By clause 15 of the written contract it is provided: "That in case any special agents, or other parties acting for said party of the first part, shall secure any business conjointly with said party of the second part, the commissions herein provided shall be divided equally between the parties to this agreement, unless specifically agreed to the contrary in writing." Appellee's counsel contend that this has no application in the present case, for the reason that appellee and Nichols did not act "conjointly." In the sense that they did not act together at the same time or times, this is true. But the \$200,000 policies may have been the result of their combined action, namely, the action of appellee, before he terminated his agency agreement, and the action of Nichols after that time, in which case we think the clause applicable.

But appellee's counsel further contend that the application for a \$100,000 insurance was never rejected by appellant, and that the insurance of \$200,000 issued on that application. It appears from the testimony of Pearman, Greenwood and Rilling himself, that instead of appellant accepting the \$100,000 application, it made a counter proposition, which Rilling testified was to issue to Mr. Braun a \$10,000 ten-year endowment policy, Mr. Braun's application having been for a \$100,000 15-year accumulation policy, and that he refused to attempt to influence Mr. Braun to accept the offered policy.

The four policies issued were not only for double the amount of insurance, but were entirely different in other respects. But counsel for appellee further contend that the four policies were not issued on the applications for them in evidence, and argues that, therefore, they must have been issued on the original application. This conclusion is a *non-sequitur*, and is apparently recognized so to be by appellee's counsel, who say, in another part of their argument: "The truth is that the application is not of controlling importance; the contract of employment says nothing about applications," etc. The basis of counsel's argument consists of the follow-

ing evidence: The four applications and the four policies are dated July 21, 1903, and at the head of each application are the following words:

“Application to the New York Life.

Received July 31, 1903.

Home Office.”

From this counsel argue that the applications appearing to have been received by appellant at the home office, in New York, July 31, 1903, the policies, which are dated July 21, 1903, could not have been issued on the applications. Mr. Braun, in his testimony, is not clear as to the date when he signed the applications. He testified that he signed the applications; that Nichols asked him to come to his office, which he did, and then Nichols took him to another place, across the street from appellant's Chicago office, where there were several physicians to examine, and that this was before they wanted him to go to New York. On being asked whether he signed the four applications on the day of their dates, he answered: “I don't remember,” but subsequently said: “Well, the assumption is that I signed at that date,” and on being asked whether that was his best recollection, he answered, “Yes.” On being further examined, he testified that he signed no paper after he got the policies. We think it evident from the examination of the witness that he could not recollect the date when he signed the applications, and that he was only certain in respect to the signing, and that he signed them before he received the policies. The fact that the applications and policies are of the same date may be merely for convenience and owing to the following in each application: “I agree on behalf of myself * * * that the insurance under any policy issued on this application shall take effect on the date of this application, unless otherwise agreed in writing.” We do not think it material whether the applications were received by the appellant at its home office in New York or its branch office in Chicago. That they were signed by appellee before the four policies were delivered, is proved by Mr. Braun's testimony, and that the

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policies were issued on the four applications is evidenced by the fact that the applications and the policies substantially correspond. There was no evidence of the first or cash premium on a policy for \$100,000, such as Mr. Braun first applied for. In a note from Rilling accompanying Braun's first application, this occurs: "I have made the following settlement of first premium of \$7,110," which is the only reference to premium on the first application. But counsel for appellee elected, on the trial, to estimate appellee's compensation as 50 per cent of the total of first or cash premiums on the policies, namely, \$10,870. On this theory, our conclusion is that his compensation should be 50 per cent of half that amount, or \$2,717.50. There is no evidence of any demand by appellee for compensation, except the commencement of this suit, and there has been no vexatious or unusual delay. Therefore, appellee is not entitled to recover any interest.

Counsel for appellant objects that the testimony of the witness Carlile as to the conversation between him and Pearman, prior to the execution of the written contract, was incompetent on the ground that it tended to vary the written contract between the parties, and cites authorities in support of the familiar rule that all prior negotiations leading up to the execution of the written contract are merged in the contract. The rule applies only to negotiations or agreements between the parties prior to or contemporaneous with the written contract, and has no application to conversations between one of the parties and a third person. That a conversation between Pearman and Mr. Carlile could not possibly vary the terms of the subsequent written contract between appellant and appellee, is, we think, self-evident.

Counsel also objects that the admission in evidence of the four policies of date July 21, 1903, was error. We think the policies were properly admitted in evidence.

Counsel for appellant asked the witness Pearman the following questions:

"Q. I will ask you to look at the four policies which have been introduced in evidence here, dated July 21, 1903, and

state whether or not you know of your own knowledge whether those policies were issued on the application dated July 17, 1902?

Plaintiff objects; sustained; defendants except.

Q. Up to the time, October 11, 1902, to date of Mr. Rilling's resignation, did you ever receive a policy for \$100,000, fifteen-pay life, on the life of Mr. George P. Braun for delivery?

Plaintiff objects; sustained; defendants except.

Q. What, if anything, did you receive from the company on that application?"

The first question was properly ruled against. The policies and applications were in evidence, and, by inspection and comparison of these, it could be determined whether the policies were issued on the applications. The ruling against the second and third questions could not, as we think, have prejudiced appellant. The testimony of Pearman and Rilling was to the effect that the only answer to the application of July 17, 1902, was a counter proposal by appellant to issue a policy different from that applied for, and the only contention by appellee's counsel, in respect to the issuing of a policy on that application, is that the four policies were issued on it. Appellant's counsel asked the witness Braun questions as to whether appellee ever procured for him a policy from appellant, on his application signed in May, 1902; whether Rilling ever presented him to the Equitable Life Insurance Company for a policy; whether he was not presented to said company for a \$100,000 policy in April, 1903, etc., and offered to prove that witness, at Rilling's request, submitted himself to said company for an examination for life insurance after October 11, 1902. The court ruled against the questions and offer, correctly, as we think. The questions were asked in support of the theory of counsel, that Rilling's resignation is to be construed as an abandonment of compensation for services rendered before his resignation, even though it should appear that such services contributed to the subsequent insurance effected by the four policies, a construction in which we cannot concur. We con-

cur in appellant's contention, that the damages are excessive.

Counsel for appellant complains of certain remarks of appellee's counsel on the trial. We will consider only such remarks as exceptions were preserved to and rulings made. The witness Pearman testified that he did not remember having seen Mr. Braun in appellant's office subsequent to January, 1903. Mr. Levinson, appellee's attorney, said: "Yes; you don't remember now." Witness: "Is there no way that I can be protected from this man stating things to me in court, that he would not state to me out of court?" Mr. Levison: "When a man comes to your Honor, and says that he did not know and does not know anything about it, when he was there when this man was examined, and now he dodges about, and says, 'I don't remember.' He knows he was there." On appellant's counsel excepting, the court said: "Yes, I think it is very objectionable to state, as a fact, that which the witness has testified was not a fact." The witness was subsequently recalled, and testified that he did then remember, when the following occurred: Mr. Levison: "Now he remembers again. He has been talking with somebody." Witness: "Mr. Levison, I said on oath that I hadn't been talking." Mr. Levison: "I don't think that an oath amounts to anything with you." On exception the court said: "I cannot see any reason for making any such statement, in regard to any witness in this case. There is nothing in this case to give the court any reason for making such a statement to these witnesses." We agree with appellant's counsel that the last-mentioned remark to the witness was very improper, and that the court might well have severely censured its author, but, in view of the court's rulings, we are not inclined to hold the remarks of counsel cause for reversal. The court instructed the jury to disregard all statements and remarks of counsel not based on the evidence.

Counsel for appellant objects that appellee had no license to carry on business as a broker. It is sufficient to say of this objection, that appellee's business was not that of a broker, that he acted merely as an insurance solicitor.

Lastly, appellant's counsel objects to certain instructions given and to the refusal of others.

Counsel say the fundamental error in the instructions given is that they permitted the jury to consider the oral evidence offered to vary the terms of appellee's contract of agency. There was no evidence which so tended. Instructions B and S, given by the court of its own motion, are favorable to the appellant in that they authorize the jury to find for the defendant, if they found from the evidence that appellee abandoned his contract. We have already shown that appellee's so-called resignation was merely a termination of his agency, and not an abandonment of any claim he might have on account of past services. Instruction B, however, is erroneous in that it authorized the jury, in the event they should find for appellee, to estimate the commissions due him on the total of the first premiums on the four policies. We think there was no error in the refusal of appellant's instruction 4. It applied only to one witness, Pearman.

Appellant's refused instruction 9 is substantially included in its given instruction 13. When the court had concluded the reading of instructions to the jury, a juror asked this question: "In bringing in our verdict, must we bring in a verdict for a definite sum, if we bring in a verdict for the plaintiff?" Whereupon it was agreed by the parties that the court might give a further instruction to the jury orally, and the court orally instructed the jury thus: "If your verdict should be for the plaintiff, which neither yourselves nor the court, at this time, undertake to express an opinion about, you would find a verdict for a definite amount, being a percentage on the premium which the evidence shows to have been paid." The only evidence of premiums paid was as to the premiums on the four policies aggregating \$10,870, and the only claim as to percentage made by appellee, as stated by his counsel on the trial, was 50 per cent of the first or cash premium. The instruction, therefore, could not have been otherwise understood by the jury, than that if they found for the plaintiff they were to estimate his commissions

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at 50 per cent of \$10,870. The instruction is misleading and erroneous. The verdict of the jury, although excessive, is, in so far as it finds appellee entitled to commissions, warranted by the evidence, and is not manifestly contrary to the weight of the evidence. We do not find in the record any evidence of partiality, prejudice or passion on the part of the jury. The estimating appellee's commissions at 50 per cent of \$10,870 was a mistake, probably induced by the oral instruction of the court, which we think curable by *remittitur*. Upon appellee filing a *remittitur*, within ten days from this date, of the sum of \$2,966.60, the judgment will be affirmed for the sum of \$2,717.50; otherwise the judgment will be reversed and the cause remanded for further proceedings in conformity with this opinion.

Affirmed on remittitur; otherwise to be reversed and remanded.

Remittitur filed in accordance with opinion and judgment affirmed for \$2,717.50, June 19, 1905.

City of Chicago v. Edward T. Noonan.

Gen. No. 11,984.

1. **TRESPASS**—*when removal of sidewalk by city does not constitute.* Where the owner of land subdivides the same, dedicating certain parts thereof as public streets, he cannot complain successfully in an action of trespass of the acts of the municipality in entering upon said dedicated land and tearing up the sidewalks built thereon by him, and failing to replace the same, in connection with the making of a sewerage improvement, such acts being within the power of the city, regardless of whether the dedication was statutory or at common law.

Action of trespass. Error to the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the October term, 1904. Reversed. Opinion filed June 15, 1905.

WILLIAM D. BARGE, for plaintiff in error; EDGAR BRONSON TOLMAN, Corporation Counsel, of counsel.

HAMLIN & BOYDEN, for defendant in error.

MR. JUSTICE ADAMS delivered the opinion of the court.

Defendant in error was plaintiff and plaintiff in error was defendant in the trial court and will be so referred to here. The suit is in trespass, and the declaration contains two counts. In the first count it is averred, in substance, that plaintiff is lawfully possessed of certain described lots in each of three subdivisions in the city of Chicago, which, with the streets and sidewalks appurtenant thereto, plaintiff hitherto has rightfully used and enjoyed, and that April 28, 1896, and on divers other days between said date and the commencement of this suit, the defendants, with force and arms, broke and entered upon said lands and the sidewalks thereto appurtenant, and, with a dredging machine, shovels and other instruments, broke in pieces, damaged and destroyed 4,000 feet of said sidewalk, the same being about six feet in width and of the value of \$2,500.

The second count differs from the first only in that it contains the following averments:

"That on, to-wit: the 28th day of April, A. D. 1896, and on divers other days, the said defendant, City of Chicago, notwithstanding its duty as aforesaid, wilfully and wrongfully aided and abetted the said defendant, William T. Healy, to damage and destroy the said sidewalks, and to dig up and subvert the earth and soil in said streets, and throw said earth and soil into large heaps, and said William T. Healy did, wrongfully and negligently, with the knowledge and consent of said City of Chicago, notwithstanding its duty as aforesaid, at the time aforesaid, with a large machine commonly called a dredging machine, and with shovels and other instruments, damage and destroy the said sidewalks and cause the earth and soil in said streets to be subverted and thrown into large heaps, by reason whereof said streets and sidewalks became and were out of repair and impassable to travel and the ingress and egress to said lands and premises, so abutting on said streets and sidewalks greatly impaired and obstructed, and from thence hitherto said streets

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and sidewalks have so remained out of repair and in impassable condition, and the ingress and egress to said lands and premises greatly impaired and obstructed, whereby the said lands and premises of the plaintiff were and are greatly damaged and reduced in value, to the damage of the plaintiff of twenty-five hundred (\$2,500) dollars, therefore he brings his suit, etc.”

The suit was dismissed as to Healy.

The defendant pleaded the general issue, and the case was tried by the court, without a jury, by agreement of the parties. It appears from the evidence that the plaintiff owned the land, made the subdivisions in which the lots in question are, and dedicated the streets in the subdivisions on which the lots abut, to the city; also that the city contracted with one William T. Healy to lay sewers in the streets on which the lots in question front; that the streets were excavated by Healy by means of a dredge or steam plow or shovel, which had outstretching arms for the purpose of maintaining its equilibrium, and that, in using it, it was necessary to remove the sidewalks. There is no evidence that there was any entry or intrusion whatever by the defendant or Healy into or upon any of the plaintiff's lots. The only evidence as to damage is in reference to the removal of the sidewalks, which plaintiff's evidence shows were worth 30 to 32 cents per running foot. The court found for the plaintiff and rendered judgment for \$2,263.90.

Counsel argue the question whether the city can or not be held liable on the doctrine of *respondeat superior*. We do not think the decision of this question necessary to the decision of the case. The real question is, whether trespass can be maintained against the city on the facts in evidence, and we think it clear that it cannot. There was no entry on any of the plaintiff's premises. Plaintiff testified that he made subdivisions and dedicated the streets in the subdivisions to the public. The city, by entering on the improvement of the streets, accepted the dedication, and if the plats of the subdivisions were statutory plats, and acknowledged and re-

corded as provided by the statute, the fee of the streets became vested in the city, as trustee for the use of the public. This is established by a long line of decisions, commencing with *Haven v. Trustees of Ill. & Mich. Canal*, 11 Ill. 554. Even in the case of a common-law dedication and an acceptance, although the fee remains in the dedicator, the city has control of the street, and may improve and use it for all legitimate purposes as a street. *Marsh v. Village of Fairbury*, 163 Ill. 401, 407; *City of Chicago v. Ward*, 169 Ill. 392, 403. Manifestly, then, trespass cannot be maintained for the improvement of a street, whether the dedication is a statutory or a common-law dedication, by either the original owner or his grantee. "A sidewalk is a portion of a public highway, appropriated, it is true, to pedestrians alone, but still open and free to all persons desiring to use and enjoy it as a public highway. It is as much a public highway, in the mode of its use, as the street itself." *City of Chicago v. O'Brien*, 111 Ill. 532, 536.

If the owner of a lot fronting on a street plants trees between the roadway and the sidewalk, for shade and adornment, the owner or his grantee has no title to the trees as against the public. *Baker v. Town of Normal*, 81 Ill. 108, cited with approval in *City of Mount Carmel v. Shaw*, 155 Ill. 37, 43. In the last case the court after referring to the general municipal incorporation act, say: "It" (meaning the city of Mount Carmel) "may do anything with its streets and sidewalks which is not incompatible with the end for which streets are established."

Counsel contend that plaintiff had a right of access and egress to and from his lots—an easement appurtenant to his lots which was his property. This may be conceded, and yet trespass would not lie for a temporary interference by the city with this right, in the making of a public improvement, which it was authorized by law to make. Besides, no damages for interference with the right of access and egress was proved, but only the cost of the sidewalks.

In *Osgood v. City of Chicago*, 154 Ill. 194, the court say: "The claim set up for loss of rent, by reason of obstruction

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to access to and egress from the building during the progress of the work, cannot be sustained. That is not damage to property not taken, within the meaning of the constitution, but merely a burden incidentally imposed upon private property adjacent to a public work, and without which such improvements can seldom be made. As said by the Appellate Court: 'To construe the constitution as giving compensation for all temporary obstructions necessary when streets are being repaired, etc., even though thereby access to abutting property is for a time cut off, would be unreasonable.'"

The removal of sidewalks which the plaintiff paid for, and the failure of the contractor and the city to replace the walks (which it seems to us from the evidence they should have done) operated harshly for the plaintiff, but did not constitute a trespass, and however much we may regret the plaintiff's loss, we must decline to furnish additional illustration of the truth of the saying, "hard cases make bad law."

The judgment will be reversed.

Reversed.

Carter H. Harrison, Mayor, v. The People of the State of Illinois, ex rel. David Stern.

Gen. No. 12,008.

1. **PAWN-BROKERS**—*when ordinance regulating business of, valid.* The provisions of the ordinances of the city of Chicago requiring reports of articles pawned to be made to the police department and prohibiting the redemption of such articles within 24 hours thereof, are, as well as other provisions of such ordinances involved in this cause, valid.

2. **MANDAMUS PROCEEDING**—*when does not lie.* A municipality cannot be compelled to grant a license to a pawn-broker where a former license issued to him was, for good cause, revoked.

3. **LICENSE**—*when revocation of, proper.* The revocation of a pawn-broker's license is lawful where it appears that he has been convicted of a violation of an ordinance regulating the business of pawn-brokers, and this notwithstanding an appeal was taken and pending from such conviction.

Mandamus proceeding. Appeal from the Superior Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the October term, 1904. Reversed. Opinion filed June 15, 1905.

Statement by the Court. May 28, 1900, David Stern, the relator, filed a petition alleging, in substance, that for two years prior to said date and up to March 23, 1904, he was engaged in the pawnbroking business at 514 W. Madison street, in the city of Chicago, and had a lease of said premises expiring September 1, 1906.

Sections 1388 to 1391, both inclusive, and section 1405 of an ordinance of the city of Chicago in regard to pawnbrokers, are set out in full in the petition, and it is alleged that petitioner procured a license, which, by its terms, would have expired April 30, 1904, but that the defendant, Mayor of said city, arbitrarily revoked the same; that, since May 1, 1904, petitioner has repeatedly applied to defendant for a license, and tendered the required bond and license fee, and offered to produce satisfactory evidence of petitioner's good character, but that defendant refuses to issue a license to him. The bond referred to is attached to and made a part of the petition. A writ of mandamus commanding appellant to receive petitioner's application, license fee and bond, and issue a license to him, to expire April 30, 1905, is prayed.

The answer of the defendant admits that the sections of the ordinance set out in the petition were in force as in the petition alleged, and that, prior to March 23, 1904, the relator was a duly licensed pawnbroker, and that, at said date the defendant revoked his license, sets out certain other sections of the ordinance relating to pawnbrokers, which will, hereafter, be referred to, and avers that the relator, March 23, 1904, was convicted, before John T. Caverly, a justice of the peace, in Chicago, of a violation of section 1397 of the municipal code of Chicago, and fined \$25, which was reported by the superintendent of police to the defendant, who thereupon revoked relator's license.

No replication was filed to the answer, the cause was heard

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on evidence produced in open court, and the court awarded a peremptory writ of mandamus as prayed in the petition.

On the trial the following colloquy between court and counsel for defendant occurred:

The Court: "You will concede he is a man of good character, will you not?" Mr. Sullivan: "Yes." The Court: "It is conceded he is a man of good reputation, and that the sureties offered on the bond are sufficient."

The relator called John J. Ryan, a police officer in the detective department, who testified that he arrested L. M. Dudley, alias Giddings, and told Lottie Evans, from whom diamonds had been stolen, that he had arrested Dudley and she said he was her husband.

Jeremiah McCarthy, deputy city collector, called by the relator, testified that the relator, before the commencement of the suit, applied for a license to conduct a pawnbroking business at 514 W. Madison street, and tendered \$300 and a bond, and a license was refused, because a license formerly held by him was revoked by Mayor Harrison. This was all the evidence introduced by the relator. The defendant then put in evidence the following sections of an ordinance of the city of Chicago:

"Section 1169. No license shall be granted for a longer period than one year, and every license, except saloon licenses, shall expire on the last day of April next following. Every license shall be signed by the mayor and countersigned by the clerk under the corporate seal.

"1392. *Record of Loans and Pledges.* Every pawnbroker and loan broker, or keeper of a loan office, shall keep a book in which shall be fairly written in ink, at the time of each loan, an accurate account and description, in the English language, of the goods, article or thing pawned or pledged, the amount of money loaned thereon, the time of pledging the same, the rate of interest to be paid on such loan, and the name and residence of the person pawning or pledging the said goods, article or thing. No entry made in such book shall be erased, obliterated or defaced.

"1396. *Report to Police.* It shall be the duty of every licensed person aforesaid to make out and deliver to the superintendent of police every day before the hour of twelve o'clock a. m., a legible and correct copy from the book required in section 1302 hereof, of all personal property and other valuable things received on deposit or purchased during the preceding day, together with the time, meaning the hour when received or purchased, and a description of the person or persons by whom left in pledge or from whom the same were purchased.

"1397. *Redemption of Pledge—When Prohibited.* No personal property received on deposit, purchase or pledge by any such licensed person shall be sold, or permitted to be redeemed or removed from the place of business of such licensed person, for the space of twenty-four hours after the copy and statement required to be delivered to the superintendent shall have been delivered, as required by the preceding section.

"1398. *Hours of Business.* No person licensed as aforesaid shall receive on deposit or pledge any personal property, or other valuable thing, before the hour of six a. m., nor after the hour of eight p. m. during the months of January, February, March, April, October, November and December of each year; nor before the hour of five a. m., nor after the hour of nine p. m. during the months of May, June, July, August and September of each year.

"1403. *Revocation of License on Police Report.* It shall be the duty of the superintendent of police to report to the mayor any failure to comply with any provision of this article, and the mayor may revoke the license of such person.

"1404. *Revocation of License on Conviction of Violation.* The mayor may forthwith revoke the license of any person who shall have been convicted before any police justice, or justice of the peace, of any violation of any provision of this chapter, whether the judgment of such justice shall have been appealed from or not.

"1165. *Mayor to Grant.* All licenses shall be granted

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by the mayor from time to time, to such residents of the city of Chicago as he may deem proper.

"1167. *Subject to Ordinances.* All licenses shall be subject to the ordinances and regulations which may be in force at the time of issuing thereof, or which may subsequently be passed by the city council; and if any person so licensed shall violate any of the provisions thereof, he shall be liable to be proceeded against for any fine or penalty imposed thereby, and his license may be revoked in the discretion of the mayor.

"1170. *Mayor's Discretion.* In all cases where it is not otherwise expressly provided, the mayor shall have the power to hear and grant applications for licenses upon the terms specified by this ordinance; and all licenses shall be issued to such person or persons as shall comply in all respects with the provisions of this ordinance, and as the mayor in his discretion shall deem suitable and proper persons to be licensed."

Defendant also introduced a report of date March 17, 1904, by John J. Ryan and John J. Kelly, detective sergeants, addressed to Francis O'Neill, General Superintendent of Police, in substance, that February 29, 1904, they recovered from the possession of the relator, at his pawn shop, 514 W. Madison street, two diamond rings belonging to Lottie Evans, valued at \$500; that the property was pawned by a man giving the name of L. M. Dudley; that they also found on Stern's books a breastpin belonging to Lottie Evans, which was pawned by the same man for \$65; that they requested Stern to turn over the breastpin, but he stated that it had been redeemed a short time before; that, shortly afterward, they arrested Dudley, alias Giddings, and took him to Stern's pawnshop, and found the breastpin in Stern's possession, and that they secured a warrant and arrested Stern for violation of the pawn shop ordinances, and, March 16, he was fined \$25 by Justice Caverly and appealed.

It appears by the evidence that this report was handed first to Andrew Rohan and John McWeeney, who sign themselves

"Lieut. Comm. Det. Bur.," and was by them referred to Francis O'Neill, General Superintendent of Police, "with recommendation that David Stern's license number 7 be revoked, as we regard him as an unfit person to have such license;" that the general superintendent approved the report, and that the defendant, March 23, 1904, revoked the license. It also appears from a certified copy of the proceedings before Justice Caverly, in *City of Chicago v. David Stern*, that March 16, 1904, the justice found Stern guilty of allowing the redemption of a pledge within twenty-four hours, in violation of section 1397 of the revised ordinances of the city of Chicago, and fined him \$25.

MICHAEL F. SULLIVAN, Assistant Corporation Counsel, for appellant; EDGAR BRONSON TOLMAN, Corporation Counsel, of counsel.

B. M. SHAFFNER, for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

Counsel for the relator, on whom the burden rests of showing clear right to the writ of mandamus, contends that section 1397, set out at large in the preceding statement, is unconstitutional and unreasonable, in that it prohibits the redemption of pledges within twenty-four hours after delivery of the copy and statement required to be delivered to the superintendent of police by section 1396 of the ordinance, also quoted in the preceding statement, and cites, in support of this contention, *Fulton v. District of Columbia*, 2 App. Cases D. C. 431. In that case it appeared that the act of Congress authorized the commissioners of the District of Columbia "to make, modify and enforce usual and reasonable police regulations in and for said District as follows: First, for causing full inspection to be made, at any reasonable times, of the places where the business of pawnbroking, junk dealing, or second-hand clothing business may be carried on." The commissioners made regulations, section 3 of which is substantially the same as section 1397 of the ordinance in question. After the promulgation of the

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regulations, Congress passed an act entitled "An act to regulate and license pawnbrokers in the District of Columbia." Held, that the regulation made by the commissioners was unreasonable, and that the act of Congress, under which the regulation was made, was repealed by the latter act, which was a revision of the entire subject-matter. The decision supports, as we think, appellee's contention. But we must be guided by the decisions in this State, as we understand them. The question here is not, whether the appellant, rightfully or not, revoked the relator's license, which expired April 30, 1904, but whether appellant can be compelled by mandamus to issue to him another license. The city of Chicago is incorporated under the general municipal incorporation law, which confers the following powers: "To fix the amount, terms and manner of issuing and revoking licenses." "To license, tax, regulate, suppress and prohibit hawkers, peddlers, pawnbrokers, keepers of ordinaries, theatricals and other exhibitions, shows and amusements, and to revoke such license at pleasure." Hurd's Rev. Stat. 1903, pp. 291, 292, clauses 4 and 41. It is not claimed that these clauses are unconstitutional, but merely that the ordinance is unconstitutional and unreasonable.

In *City of Chicago v. Launder*, 111 Ill. 291, a section of an ordinance substantially the same as section 1396, was passed on by the court. The appellant objected that the section was "unreasonable, unjust and oppressive, and without authority of law." The court, after referring to the grant of power in clause 41 of section 62, above quoted, say: "Under this grant of power, it is a matter purely discretionary with the city authorities whether they will license and regulate the business of pawnbrokers, or wholly prohibit and suppress business by them within the city. In such case, if the city grants a license, it may impose such conditions and burdens as it may see fit," etc. The court further say: "In this case, without a license the appellant had no right to engage in the business of a pawnbroker within the city. He sought for and obtained the city's license to transact such business, and took the privilege his license conferred, subject

to the restrictions and burdens imposed by the ordinance under which, alone, it could issue. This was an unmistakable recognition and admission of the validity and binding force of the ordinance. By taking such license he secured immunity from prosecution for engaging in his vocation, if he conformed to the terms on which it was given him. The ordinance certainly did not invade any right of property or other right, but it conferred a right. Appellant having profited by taking a license, with full knowledge of the conditions imposed, can not refuse to carry out such conditions. We do not regard the ordinance as being 'unjust, unreasonable, tyrannical and oppressive.' The requirements objected to are but reasonable means to keep the pawnbrokers' business free from great abuse by thieves disposing of stolen goods in their shops. They are all made in the interest of the public, and are intended for the detection and prevention of crime. The ordinance is not tyrannical and oppressive, as the appellant was not bound to bring himself within its provisions. Before taking out license, appellant knew he had to keep a book containing an account and description of goods pawned, amount of money loaned thereon, the time of pledge, rate of interest, and the names of pledgors, and that such book must be kept open for the inspection of the mayor and any member of the police, and no objection seems to have been urged to these requirements, and it appears that appellant has always complied with them."

The relator, in his petition, avers that he tendered "*the required bond*," and attaches to his petition and makes part thereof a copy of the bond tendered, and one of the conditions of the bond is that it is "subject to revocation at the discretion of the mayor." Counsel for relator says that the relator's appeal from the judgment rendered by Justice Caverly suspended that judgment, a proposition wholly irrelevant in the present case, the question here being whether the mayor can be compelled by mandamus to issue to the relator another license. We may say of the proposition, however, that by section 1404 of the ordinance, the mayor is empowered to revoke the license of a pawnbroker who has been con-

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victed by a police justice or a justice of the peace of any violation of the ordinance, whether the judgment shall or not have been appealed from. Were it otherwise, the power would, in most if not all cases, be inefficacious, as the offender, by appealing, might prevent revocation during the term of his license.

Counsel for appellee further says he cannot see why the revocation of his client's license should operate as a bar to the present application, especially as it was admitted that relator's character is good. Section 1170 of the ordinance provides: "All licenses shall be issued to such person or persons as shall comply, in all respects, with the provisions of this ordinance, and as the mayor, in his discretion, shall deem *suitable and proper persons to be licensed.*"

It appears from the evidence that when the relator was requested by the police to produce a breastpin, which his books showed had been pawned by L. M. Dudley, he said it had been redeemed; but subsequently the officers found the breastpin in his possession. We cannot say the mayor erred in deciding that relator, who thus deliberately violated the ordinance, was not a fit or proper person to be licensed.

The judgment will be reversed.

Reversed.

**City of Chicago, et al., v. Chicago Terminal Transfer
Railroad Co.**

Gen. No. 11,982.

1. PRACTICE AND PLEADING—*disregard of, may be ground for reversal.* The action of the parties and of the trial court in disregarding the statutory requirements as to practice and pleading, might if taken advantage of in apt time, have been ground for reversal.

2. STREETS AND HIGHWAYS—*right of railroad companies to enter upon.* A railroad company incorporated under chapter 114 of the Revised Statutes can cross any highway outside of cities and villages without further condition than that it shall not unnecessarily impair the usefulness of the highway. It cannot construct its rail-

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road upon or cross any street in any city or village without the assent of the corporation of such city or village.

3. *STREETS—how grant of railroad company in, construed.* Grants by municipal corporations of special privileges in its streets are to be strictly construed, and all doubts are to be resolved against the railroad company.

4. *STREETS—grants to railroad companies in, may be conditional.* The grant of a power or privilege to a railroad company in a street may be made conditional.

5. *STREETS—grant to railroad company in, construed.* The power to cross certain streets with "one or more railroad tracks," construed not a continuing one but as having been exhausted by the construction of a single track.

Mandamus proceeding. Appeal from the Superior Court of Cook County; the Hon. JESSE HOLDOM, Judge, presiding. Heard in this court at the October term, 1904. Reversed. Opinion filed June 15, 1905.

WILLIAM D. BERGE, for appellants; EDGAR BRONSON TOLMAN, Corporation Counsel, of counsel.

JESSE B. BARTON, for appellee.

MR. JUSTICE BROWN delivered the opinion of the court.

This is an appeal by the city of Chicago and the Commissioner of Public Works of said city from a judgment of the Superior Court of Cook county on a petition filed by the Chicago Terminal Transfer Railroad Company, entitled a "Petition for Mandamus," and praying that the said city and its Commissioner of Public Works "be compelled by the judgment or order of the court to grant to the petitioner permission to lay a second main track across 79th, 80th and 81st streets in said city of Chicago."

The order or decree appealed from is treated by the parties as an order awarding a peremptory writ of mandamus, and we shall so treat it. It is in fact irregular for a mandamus proceeding. It is rather in the nature of a mandatory injunction in chancery, whereas mandamus is strictly a common law remedy.

The order makes no mention of the issuance of a writ of mandamus, but after reciting the hearing of the cause on the petition, answer and "general replication" and on argument

by counsel, it directly "Orders and decrees that the said city of Chicago and said F. W. Blocki, Commissioner of Public Works of the city of Chicago, do permit the petitioner the Chicago Terminal Transfer Railroad Company to lay down, maintain and operate an additional main track across 79th street, 80th street and 81st street in the said city of Chicago within the exterior lines of its right of way as extended across said street."

To the petition in the cause a general demurrer was first interposed by the defendants, which, however, was withdrawn by them on their own motion. Thereupon they filed an answer, and to the answer the petitioner filed "a special replication," as it was entitled. (Strictly under the correct practice in mandamus, this special replication should have been denominated a plea to the answer.) It was demurred to by the defendants and the demurrer was sustained by the court. Then the petitioner asked and obtained leave to file "a general replication" to said answer. The replication filed was in the usual form of a general replication *in chancery*.

There is a bill of exceptions in the record reciting a stipulation by the parties that all the allegations of fact in the petition and answer are true, and that the facts are therein correctly set forth, and containing also an agreed statement of a further fact hereafter in this opinion recited. This bill of exceptions shows by implication (although it does not so appear otherwise in the record) that a jury was waived in this proceeding by the agreement of the parties and the cause submitted to the court on the issues raised by the petition, answer and stipulated facts; and as the statements of all of them are agreed to be true, the whole question is one of law. The hearing below was like that of a chancery cause on bill and answer. The cause having been so informally and irregularly treated by the parties and by the Superior Court, will in the interest of a speedy disposition of the merits of the matter be so treated by us, although as the Appellate Court of the Third District has said in a similar mandamus case, "the making up of the issues, as in a chancery proceeding, instead of adopting the practice

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pointed out in the statute, was therefore an irregularity which if taken advantage of in apt time, might in a proper case be a good cause for reversal." Commissioners of Highway v. Gibson, 7 Ill. App. 231. We shall address ourselves in this cause, however, directly to the question, do the facts admitted by all parties to the controversy warrant an order on the city of Chicago and its officers to allow the action desired by the railroad company? In other words, has the railroad company under the conceded facts a clear legal right to lay another track over 79th, 80th and 81st streets?

The facts as they appear from the petition, answer and stipulation are these: May 13, 1872, the Common Council of the city of Chicago by ordinance gave permission and authority to the LaSalle and Chicago Railroad Company to lay down, maintain and operate "one or more railroad tracks along and upon the following named route and streets in the city of Chicago, to-wit: Commencing at the western city limits adjacent to the right of way of the Chicago, Burlington and Quincy Railroad Company, thence as near as practicable to the said Chicago, Burlington and Quincy Railroad tracks to Rebecca street, thence on the south half of Rebecca street to or near the east end of Rebecca street, thence to Meagher street, thence on the south side of Meagher street (and on the alleys between Johnson and Halsted streets, running on a line nearly due west of Meagher street) and across Meagher street to Stewart avenue, thence north on Stewart avenue and Beach street to Harrison street, thence north across Harrison street on the east side of the tracks of the Pittsburgh, Fort Wayne and Chicago Railroad Company, on any property said LaSalle and Chicago Railroad Company may acquire by purchase, condemnation or otherwise, to the south line of West Adams street, provided that the LaSalle and Chicago Railroad Company shall not in entering the city occupy or cross the depot grounds of another company."

The second section of said ordinance was as follows:

"Sec. 2. The said railroad company may cross any and

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all streets and alleys and railroad tracks upon or along the line of its said route. Said company to be subject to the directions of the board of public works of said city, in the construction of its said tracks and the keeping in repair of so much of said streets, alleys and crossings as may be occupied by said railroad company with its tracks, switches and turnouts."

Section five was as follows:

"Sec. 5. The said railroad company shall be subject to all general laws and ordinances of the common council of the said city, in relation to railroads."

The ordinance in its 10th section concluded as follows:

"Provided * * * This ordinance shall be null and void unless the tracks herein provided for shall be constructed within two years from the date of the passage hereof."

The LaSalle and Chicago Railroad Company having changed its name to the Chicago and Great Western Railroad Company, the City Council May 11, 1885, passed an amending ordinance recognizing this change in the first section, and proceeding as follows:

"Sec. 2. That in addition to the permission and authority given and granted to said company, in and by said original ordinance, and still held by said company to lay down tracks within said city, further permission and authority be and is hereby given and granted to said railroad company, to lay down, maintain and operate one or more railroad tracks with the necessary and convenient side-tracks, switches, and appurtenances over, upon and along such property as it now holds, or has acquired the right to lay tracks upon, or which it may hereafter acquire by purchase, condemnation or otherwise, over, along and upon the following route: Commencing at the west line of said city of Chicago, at some convenient point to be selected by said railroad company, between west Twelfth street and the line of West Polk street, extended west to the city limits; thence to

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or near the tracks of the Pittsburg, Cincinnati & St. Louis, and the Chicago and Northwestern Railroads; thence southerly and easterly, and within six hundred (600) feet of the said last mentioned tracks to Wood street; thence easterly and between the tracks of the Chicago, Burlington and Quincy Railroad Company and the line of the alleys running east and west through the tier of blocks bounded on the north by West Fifteenth street to Morgan street; thence easterly and between the tracks of said Chicago, Burlington and Quincy Railroad, and the center line of the blocks bounded north by Wright street, to or near Stewart avenue; thence by such curves as may be necessary, and northerly and easterly, and between Canal street and Fifth avenue to Van Buren street on the west side, or Harrison street on the east side of the Chicago river; with a branch from said main line, at some convenient point between Rockwell and Leavitt streets, southerly to the city limits of the city of Chicago; provided, however, that not more than two of said main tracks with switches and side-tracks shall be laid longitudinally in any street or streets upon said original route, and that said tracks shall all be laid as near as practicable to the north end of the viaducts over Canal and Halsted streets and Blue Island and Center avenues.

Sec. 3. The said railroad company may cross any and all railroad tracks, streets, alleys and highways upon or along the line of said route, but the permission and authority hereby granted shall be subject to all the limitations and conditions of the ordinance to which this is an amendment, except as the same may be expressly repealed by this amended ordinance.

Sec. 4. The proviso contained in section 10 of said original ordinance is hereby repealed, and in lieu thereof it is hereby ordained that the said original ordinance and this amended ordinance shall be null and void, unless the tracks of said company shall be constructed from the terminal station at or near Harrison street to the southern or western limits of said city within three (3) years from the passage of this amended ordinance; said three years to be exclusive

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of any and all delays arising from, or occasioned by legal proceedings against said company, or by the acts of said city of Chicago, its officers, agents and servants."

Within three years from May 11, 1885, the Chicago and Great Western Railroad Company had constructed its line of railroad, consisting of double main tracks with such side-tracks, switches and turnouts as were then needed, from the western limits of Chicago between the points referred to in the ordinance of May 11, 1885, easterly and southerly, and crossing Stewart avenue at or about Meagher street and within the limits prescribed in said ordinance, and thence easterly and northerly and across the south branch of the Chicago River to the corner of Fifth avenue and Harrison street.

In 1889 the Chicago and Northern Pacific Railroad Company was created and organized under the statutes of Illinois, and by deed dated March 11, 1890, acquired all the railway property and corporate rights and franchises of the Chicago & Great Western Railroad Company, and immediately thereafter went into possession of and operated the same.

July 20, 1891, the City Council of Chicago passed an ordinance providing for the erection of viaducts over the tracks of the Northern Pacific Railroad Company at Taylor street, 14th street and Ogden avenue, the fifth and seventh sections of which are as follows:

"Sec. 5. That the obligations imposed upon and the privileges granted to said Chicago & Northern Pacific Railroad Company, as the successor of the Chicago & Great Western Railroad Company (formerly known as the LaSalle and Chicago Railroad Company) by an ordinance entitled 'An ordinance concerning the LaSalle and Chicago Railroad Company,' passed May 13, 1872, and the ordinance amendatory thereof, passed May 11, 1885, are hereby declared to be in full force and effect to the southern limits, of the city of Chicago as they now exist, but upon the same provisions and conditions as are contained in the said ordinance as amended

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as aforesaid as if they were inserted herein; provided, however, that said Chicago & Northern Pacific Railroad Company shall not charge more than a five (5) cent fare upon suburban trains between Harrison street depot and the city limits at 95th street, and all intermediate stations, tickets for said fare to be purchased in packages of not less than twenty-five (25)."

"Sec. 7. That this ordinance shall take effect and be in force from and after its passage and acceptance by said Chicago & Northern Pacific Railroad Company; provided, however, that the acceptance of this ordinance by said railroad company shall be considered and is hereby declared to be a contract on the part of said Chicago & Northern Pacific Railroad Company to perform the obligations herein imposed upon it and the performance of said obligations by said Chicago & Northern Pacific Railroad Company is hereby declared to be the consideration for the rights, privileges and property herein conferred upon said railroad company."

On September 14, 1891, the City Council amended section 5 merely by substituting "47th street" for the words "City limits at 95th street," and the ordinance as amended was accepted by the Chicago & Northern Pacific Railroad Company.

No ordinances bearing upon appellee's alleged right to construct, maintain or operate railroad tracks that cross or will cross 79th, 80th or 81st street have been enacted, except those above described, and except the general ordinance of the city of Chicago that no person shall open or disturb any street in said city without first obtaining a permit so to do from the Commissioner of Public Works of said city.

Within three years from July 20, 1891, the Chicago and Northern Pacific Railroad Company had constructed a double track railroad leaving its main line at a point between Rockwell and Leavitt streets and thence running southerly to 75th street, and a single main track railroad from 75th street to 87th street (being the southern city limits of Chicago), and thence running southerly to the village

of Blue Island and the city of Harvey in Cook county, with such side-tracks, turnouts and switches as were then necessary. The railroad so constructed has ever since been operated by the Chicago and Northern Pacific Railroad Company and its successor in title. The single main track from 75th to 87th street was laid on a strip of land not less than 66 feet in width, acquired as a right of way by the Chicago and Northern Pacific Railroad Company. Through a judicial foreclosure sale of all the properties, rights and franchises of the Chicago and Northern Pacific Railroad Company, the said properties, rights and franchises came into the ownership, possession and operation of the petitioner, the Chicago Terminal Transfer Railroad Company, July 1, 1897. Said ownership, possession and operation continued up to the filing of the petition in this cause.

The petition states (and as before set forth, it is stipulated that all the allegations of fact in the petition and answer are true) that at the time of the construction of said railroad double main tracks were sufficient to handle the business of said Chicago and Northern Pacific Railroad Company to a point between its terminal at or near Harrison street and Fifth avenue and a point near 75th street, and that a single main track was then sufficient to handle such business from said point at or near 75th street to the southern limits of the city, but that the increase of business on the said line of railroad and the demands of the public now require that an additional main track be laid parallel to and at the usual distance from said first main track and on the right of way so as aforesaid acquired from said point at or near 75th street south to the city limits.

April 21, 1904, the Chicago Terminal Transfer Railroad Company applied to F. W. Blocki, Commissioner of Public Works of the city of Chicago, for a permit to lay a second main track across said 79th street, 80th street and 81st street, within the limits of petitioner's right of way, such permit being required under the general ordinance before alluded to, that no street shall be disturbed without a permit therefor issued by the Commissioner of Public Works. The

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Commissioner refused such permit, and in doing so represented the city of Chicago, which admits that it confirms said denial. The city claims that said petitioner had no right or authority to construct said proposed tracks across said streets, and that the Commissioner of Public Works is without power to authorize it to do so, and asserts that it has never authorized or consented to the construction of the proposed track.

Since May 11, 1888, that is, more than three years after the passage of the ordinance of May 11, 1885, the city of Chicago and its Commissioner of Public Works have issued to the petitioner or to its predecessors in title permits to lay additional tracks across streets at the times and places hereinafter set forth, to-wit: across Washtenaw avenue, July 17, 1891; across West Fifteenth street, June 15, 1894; across Newberry avenue, October 11, 1898; across Laffin street and an adjacent alley, December 22, 1899; across Brown street, December 28, 1899; and in, along and upon Beach street from Polk street to 12th street, September 24, 1897. Neither the petitioner nor any of its predecessors in title have, however, ever constructed or operated more than one railroad track across said 79th street, 80th street or 81st street.

The appellant has assigned as error in the action of the court below, the "awarding the writ of mandamus," and the refusal to hold this proposition of law: "The petitioner is not now entitled to a permit authorizing it to construct any new track across 79th, 80th or 81st street."

It is plain that the answer to the question at issue between the parties here depends entirely upon the proper construction to be given to language in the ordinance passed in favor of the Chicago & Great Western Railroad Company May 11, 1885, and revived in favor of its successor, the Northern Pacific Railroad Company, July 20, 1891.

By the statute law of the State, the city of Chicago and all other cities and villages similarly organized, have full authority to regulate the use of streets and to provide for and change the location, grade and crossings of any railroad.

Although a railroad company incorporated like the peti-

tioner under chapter 114 of the Revised Statutes, can cross any highway outside of such cities and villages, without further condition than that it shall not unnecessarily impair the usefulness of the highway, it cannot construct its railroad upon or across any street in any such city or village without the assent of the corporation of such city, town or village. The Supreme Court has repeatedly held that there is vested by these statutory provisions in incorporated cities and villages full and exclusive authority over the matter of railroad crossings in the streets and highways within their limits, and that the assent of the city is a condition precedent to the construction of any railroad track across a street within its limits. Rev. Stat., chap. 24, sec. 63, pars. 25 & 26; chap. 114, sec. 20, par. 5; C. & W. Ind. R. R. Co. v. Dunbar, 100 Ill. 110-127; County of Cook v. G. W. R. R. Co. et al., 119 Ill. 218; Tudor v. Chicago & South Side Rapid Transit R. R. Co., 154 Ill. 129. This consideration makes many of the authorities cited by appellee in its argument inapplicable, for there is a manifest difference between the right belonging to a railroad company to exercise a continuing power of acquiring more land on which to lay additional tracks, despite the statutory provision that its corporate existence and powers shall cease unless it is "finished and put in operation within ten years," and the alleged right claimed here under "the common law of the State," "to provide additional facilities when its increased traffic requires the same," by crossing with new tracks streets already crossed by tracks built within a time specified by a city ordinance.

In the one case the statute forfeits (if the road is not "finished and put in operation" within a certain time) a corporate existence before secured, and the language is construed, as language providing for such a forfeiture would always be, so as not to give to it an entirely unreasonable meaning and forfeit a franchise because the road, although in operation, is not so far finished as to make it certain that subsequent construction might not, in the future, seem desirable. If the corporate existence is *not* forfeited, the power to condemn continues as a matter of course.

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But in the other case, the city or village makes a grant of a special privilege in its streets, without which grant the railroad would be utterly powerless to cross them. The question, therefore, simply is,—what did the city grant? In answering it, the canons of construction require that the grant, which is by the public of a special privilege, should be strictly construed. If the meaning of the words be doubtful, they will be taken most strongly against the grantee. This is well expressed by the Supreme Court of the United States in *Central Transportation Co. v. Pullman Palace Car Co.*, 139 U. S. 24. It says: "By a familiar rule every public grant of property or of privileges or franchises, if ambiguous, is to be construed against the grantee and in favor of the public; because an intention on the part of the government, to grant to private persons or to a particular corporation property or rights in which the whole public is interested, can not be presumed unless unequivocally expressed or necessarily to be implied in the terms of the grant, and because the grant is supposed to be made at the solicitation of the grantee and to be drawn up by him or by his agents, and therefore the words used are to be treated as those of the grantee. This rule of construction is a wholesome safeguard of the interests of the public against any attempt of the grantee, by the insertion of ambiguous language, to take what could not be obtained by clear and express terms." See, also, *City of Chester v. Wabash, C. & W. R. R. Co.*, 182 Ill. 382.

There is no doubt that the grant of a power or privilege may be made conditionally by the municipality. *Byrne v. Chicago Gen. Ry. Co.*, 169 Ill. 75; *McCartney v. C. & E. R. R. Co.*, 112 Ill. 611; *Chester v. Wabash, C. & W. R. R. Co.*, 182 Ill. 382.

In this case the appellant claims that the right to cross 79th, 80th and 81st streets with railroad tracks was given to the appellee's predecessor on condition that all such tracks so crossing those streets should be built by it within three years from September 11, 1885, and at most was revived in favor of the Northern Pacific R. R. Co. July 20, 1891, for the three years next succeeding. The appellee, on the con-

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trary, as we understand, claims that its predecessor in title was given on September 11, 1885, the right to lay down one or more railroad tracks (any number at least it is to be presumed that could be put into its right of way) between a point on its main line between Rockwell and Leavitt streets to the limits of Chicago on the south, and to cross with such tracks all streets and highways upon the line of said route, the condition being only that some track for said company should be laid from the Harrison street terminal to the southern or to the western limits of the city within three years thereafter. Or if this cannot be sustained, it claims that at least by such ordinance its predecessor was given such right on the condition that some track was laid from the terminal to the southern limits within said three years, and that this right was revived and extended July 20, 1891, on the condition that some track was thus laid to the southern limits within three years from that time. If only one track to the southern limits were thus laid before July 20, 1894, it would be enough, according to this interpretation, to render the ordinance an effective and continuing authority for all time to come to cross all streets along its route with as many tracks as it could place within the limits of the right of way it had acquired between said streets.

We think the appellants' interpretation of the ordinance the correct one. The language in the ordinance of 1885 directly bearing on this question is this: "Permission and authority are hereby given and granted to said railroad company to lay down, maintain and operate one or more railroad tracks * * * upon and along such property as it now holds or has acquired the right to lay tracks upon, or which it may hereafter acquire * * * over, along and upon the following route * * * with a branch from said main line at some convenient point between Rockwell and Leavitt streets southerly to the city limits of the city of Chicago. * * * The said railroad company may cross any and all * * * streets, alleys and highways upon or along the line of said route, but the permission and authority hereby granted shall be subject to all the limita-

tions and conditions of the ordinance to which this is an amendment" (i. e., the ordinance of May 13, 1872), "except as the same may be expressly repealed by this amended ordinance. The proviso contained in Section 10 of said original ordinance is hereby repealed, and in lieu thereof it is hereby ordained that the said original ordinance and this amended ordinance shall be null and void, unless *the tracks* of said company shall be constructed from the terminal station at or near Harrison street to the southern or western limits of said city within three years from the passage of this amended ordinance." Viewed by itself, and under a construction liberal to the grantee, this language might easily be taken to mean what the appellee claims that it means—that all the provisions and permissions of the ordinance were to remain indefinitely in force, if only the implied promise on which it was obtained, namely, to have some sort of a railroad in operation from the Harrison street terminal to the city limits in three years were kept. But in the first place, the language ought not to be construed simply by itself and without reference to language elsewhere. The ordinance which it amends and to which it refers, is by that very reference made a proper element to be considered in the interpretation. In that ordinance the time provision, for which a substitute was made in the later one, was this: "This ordinance shall be null and void unless *the tracks herein provided for* shall be constructed within two years from the date of the passage thereof." We think it is a fair inference that by the first ordinance the council meant that the permission to lay tracks across streets should last only for two years from its passage, and that in reviving the permission thirteen years later, it meant merely to substitute a three years' limitation of the same nature for that of two years found in the earlier ordinance.

Secondly, the language must be construed strictly against the grantee, as we have seen.

Thirdly, the argument *ab inconvenienti* is entitled to some weight. It does not seem reasonable, and it certainly is not desirable that, because an ordinance at some time, when a

given section of the city is in a certain condition, gives to a railroad company the right to cross streets therein with "one or more railroad tracks," and one track is thereupon laid, therefore that railroad should have, indefinitely in the future, when conditions in the neighborhood have perhaps adapted themselves to the single track, the power to multiply several times the space taken by the crossing, and thereby the dangers incident thereto. It would seem, on the contrary, that the Council at all times should retain, except for reasonable periods in advance, the complete control of the streets, and that it should be to the Council that the railroad company should go for permission to provide its coveted "increased facilities."

We do not find among the cases cited by appellants any on all fours with the case at bar, but we think the decisions of the Supreme Court in *People v. Louisville & N. R. R. Co.*, 120 Ill. 48, and *Snell v. Chicago*, 133 Ill. 413, are not without a bearing on the case at bar.

Speaking of an Act of the Legislature of Georgia authorizing the connection of two railroads through the streets of a city, "with such side tracks, turnouts and sheds as may be necessary for the convenience of freights and passengers," the Supreme Court of Georgia said: "It seems plain to us that side tracks, etc., which did not become necessary for the convenience of freights and passengers until twenty or thirty years thereafter, could not have been in legislative contemplation when the act was passed. The much safer and more rational construction is that the powers conferred by the act were exhausted by their exercise and by the consequent connection of the railroads." *Savannah R. R. Co. v. Woodruff*, 86 Ga. 94. This language seems in point in the present case. The City Council gave by its ordinance permission to make crossings on a given route with "one or more railroad tracks." When the company chose to make them with "one" and not "more," that particular permission may reasonably be said to have been exhausted.

The appellee urges that by their action in the past, the

city officials have shown that they put a construction on the ordinance of 1885 different from that which the city at present claims. This seems to be true, but anything less than an estoppel by the action of the city under this ordinance can not avail the appellee. Such estoppel is not claimed and could not under the facts be substantiated.

The claim of the appellant in the Reply Brief, that because the ordinance of 1885 provides that "it shall be null and void unless the *tracks*" (in the plural) are constructed within the time fixed, therefore it "requires the company to lay more than one track within three years or to go without any track," and that it therefore has lost the right to maintain its present track, is plainly without basis. The ordinance is for "one or more railroad tracks," and the words "the tracks" in the last section, mean also "the tracks, one or more."

The judgment of the Superior Court must be reversed, for of course no mandamus will lie to a city official or to a city to grant a permit for which there is no proper authority.

Reversed.

Lora Groszglass v. Herman Von Bergen, administrator.

Gen. No. 11,995.

1. **APPEAL**—*when lies to Appellate Court.* An appeal from an order of the County Court, remanding to the custody of the sheriff a petitioner who was held under *captas* and who had applied for discharge under the Insolvent Debtors' Act, is properly to be taken to the Appellate and not to the Circuit Court.

Petition for discharge under Insolvent Debtor's Act. Appeal from the Circuit Court of Cook County; the Hon. FREDERICK A. SMITH, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed June 15, 1905.

BURRES & MCKINLEY and ELIJAH N. ZOLINE, for appellant.

J. H. PERKINSON, for appellee.

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MR. JUSTICE BROWN delivered the opinion of the court.

The appeal in this case is from an order of the Circuit Court of Cook county dismissing an appeal to said Circuit Court from the County Court.

The judgment in the County Court was that the petition of Lora Groszglass to be released under the Insolvent Debtor's Act from imprisonment and custody on a *capias ad satisfaciendum* issued by the Superior Court of Cook county, in favor of Barbara Von Bergen, should be denied, and that the said Lora Groszglass should be remanded to the custody of the sheriff until the further order of the court, and the costs of the proceeding be taxed against her.

The only question for us to decide is whether the appeal was wrongfully taken to the Circuit Court.

This is not a new question. It has been more than once passed on by this court adversely to the contention of the appellant. This is apparently conceded by counsel, who, however, urge us "thoroughly to reconsider the entire question." We cannot reconsider it, however, without reference to the cases already decided by this court, and much less can we do so without taking account of the utterances of the Supreme Court.

It has been decided, in the first place, that a petition under the Insolvent Debtor's Act is the proper method for one to seek a release when arrested under a *ca. sa.*, and that it is then for the creditor to show that the petitioner is not entitled to relief under it. *Kitson v. Farwell*, 132 Ill. 327; *Sawyer v. Nelson*, 44 Ill. App. 184. It has also been decided that section 8 of the Appellate Court Act by implication repeals the provisions of the statutes which are in conflict with it. *Union Trust Co. v. Trumbull*, 137 Ill. 146; *Grier v. Cable*, 159 Ill. 29; *McCune v. American Screw Co.*, 170 Ill. 622. The same cases also decide that sections of the statute giving an appeal from the County Court to the Circuit Court, in cases in which section 8 of the Appellate Court Act provides for appeals to the Appellate Court, are in conflict with the Appellate Court Act. The Appellate Court Act provides for such appeals from all final judgments

of County Courts "in any suit or proceeding at law or chancery."

The Supreme Court decided in *Grier v. Cable*, 159 Ill. 29, and in subsequent cases have acted upon the proposition, that certain statutory proceedings in the Probate Court were not "proceedings in law or chancery" and bear no analogy thereto, and that consequently appeals from the County Court to the Circuit Court still lie in those matters. But both the Supreme Court and this court have decided that proceedings arising under a statute of Illinois in relation to insolvency—that concerning voluntary assignments—were, although statutory, "proceedings in law or chancery" ("a chancery proceeding regulated by statute"—one such matter was called by the Supreme Court), and that appeals do not lie from the final judgment of the County Court in such cases to the Circuit Court, but to the Appellate Court. *Union Trust Co. v. Trumbull*, *supra*; *Levy v. Chicago Nat'l Bank*, 158 Ill. 88; *Heinzelman Bros. v. Schrader*, 150 Ill. 227; *Columbian Light, Heat & Power Co. et al. v. Bunker*, 51 Ill. App. 258. As the Supreme Court said in *McCune v. American Screw Co.*, 170 Ill. 622, the cases decided "have exhausted the discussion of the subject. The question can no longer be regarded as an open one."

In the cases of this kind cited by appellant, in which appeals came through the Circuit to the Appellate and Supreme Courts (*Sawyer v. Nelson*, 160 Ill. 629, and *Kitson v. Farwell*, *supra*), the point was not raised or discussed. The Supreme Court has also decided, with reference to the same question of appeal involved here, that a proceeding in bastardy, which is certainly more purely a statutory matter than the one at bar, is "a proceeding at law." *Lee v. People*, 140 Ill. 536.

Finally, proceedings under the same Act involved in this appeal, the Insolvent Debtor's Act, and of the same nature, have been by this court declared to be proceedings at law, and to involve a direct appeal to this court and not to the Circuit Court. *Huntington v. Metzger*, 51 Ill. App. 222; not reversed as to this point in 158 Ill. 272; In the Matter of Har-

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manek, 66 Ill. App. 593; In the Matter of Christian Busse, 80 Ill. App. 261. Though the court in the last case expressed a doubt of its jurisdiction, it asserted and retained it, and the doubt no longer exists.

The Appellate Court of the Third District has arrived at the same conclusion, and has discussed at some length the question whether such a petition as is involved here is a proceeding at law, reaching an affirmative answer. First Nat'l Bank v. Sanford, 83 Ill. App., 58. The reasoning of the learned judge therein commends itself to us, and we are in accord with it, but even if it did not, we should not feel ourselves at liberty to depart from the doctrine of *stare decisis* so far as to change a rule laid down before by us so clearly. Nor would it be to any good purpose. The simplification, not the multiplication of appeals is desirable.

Interest rei publicae finis sit litium.

Affirmed.

Jacob Glos v. Anthony J. Cannata.

Gen. No. 12,001.

1. **SIDEWALK TAX—when void.** An ordinance enacted under the Sidewalk Act of 1875, providing for the construction of disconnected sidewalks in different streets, is invalid and void.

2. **TAX—what does not support pretended.** The mere fact that a pretended tax was not objected to in the County Court does not give it any additional validity, where it is attacked as void in an action to enjoin the issuance of tax deeds upon certificates of sale based upon such tax.

3. **REIMBURSEMENT—when need not be made to holder of tax certificates.** Where there never was a valid tax to support a sale, it would be error to require reimbursement to be made to the holder of tax certificates upon which the issuance of tax deeds is enjoined.

Bill to remove cloud, etc. Appeal from the Superior Court of Cook County; the Hon. MARCUS KAVANAGH, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed June 15, 1905.

Statement by the Court. This is an appeal from a decree of the Superior Court of Cook county finding and decreeing that a certain ordinance of the Village of Wilmette for the construction of a sidewalk in forty-two different streets and parts of streets in that village, is void; that the return of the village clerk of Wilmette of the delinquency of certain lots in said village for a special tax levied against them under the provisions of said ordinance was void; that a judgment and order of sale entered in the County Court of Cook county on said lots for the non-payment of said special tax, were void, and that the sale thereupon was void; cancelling and annulling certain certificates of sale issued on said lots at said sale, and enjoining and restraining an application by the appellant as holder of said certificates to the county clerk for a deed based on said certificates, or his asserting title to said lots by virtue of said certificates, and enjoining and restraining the county clerk from issuing any deed on said certificates or recognizing them as valid.

The chancellor in the Superior Court, on a bill filed by appellee alleging that he was the owner of the said premises (the legal description of which is lots one (1) and two (2) in block four (4) of E. T. Paul's Second Addition to Wilmette) and praying for that relief which was given in the decree as above set forth, held, that the ordinance in question was void, because without legislative authority. He presumably held that the Sidewalk Act of 1875, under which the ordinance purported to be passed, does not provide for laying sidewalks upon more than one street under one ordinance and tax. This is one of the grounds of the invalidity alleged in this bill. The chancellor likewise held the proceedings which resulted in the judgment and sale under which the certificates of attack were issued, void, because they were based on a return of the village clerk of the village of Wilmette, which did not contain any bill of costs or copy of any bill of costs of said sidewalk, showing in separate items the cost of grading, materials, laying down and supervision, and because section 3 of the Sidewalk Act of 1875 was not complied with.

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The ordinance was attacked in the bill also on the ground that it failed to give a description of the improvement provided to be made under the same, that it failed to fix the grade of the sidewalk, and gave an insufficient description of the material out of which said sidewalk was to be composed, but there was no finding by the decree on these points.

The appellant, under his assignments of error, raises and argues these propositions: First, that there is nothing alleged or proven showing the ordinance void or invalid; second, that objections such as are urged by the bill to the judgment should have been made directly to the County Court, and not asserted collaterally in an attack on the certificates of sale, as in this bill; and, third, that in any event the decree should have provided for reimbursing the defendant to the extent of anything paid by him at the tax sale, with interest.

JACOB GLOS, appellant, *pro se*; JOHN R. O'CONNOR, of counsel.

TAYLOR & MARTIN, for appellee.

MR. JUSTICE BROWN delivered the opinion of the court.

This cause must be controlled by the decisions of the Supreme Court in *People v. Latham*, 203 Ill. 9, and *People v. Grover*, 203 Ill. 24, which distinctly hold that an ordinance passed under the Sidewalk Act of 1875 (an act to provide additional means for the construction of sidewalks in cities, towns and villages, approved April 15, 1875) can legally provide only for the laying of a sidewalk on one street alone, and not on a number of different streets, and that a special tax levied under an ordinance which ordered such a construction upon many disconnected streets in the same village, could not be sustained.

The appellant says in his reply brief that he finds nothing in these cases to sustain appellee's theory, that under the Act of 1875 a sidewalk cannot be constructed on more than one street under one ordinance. This is an easy way of disposing of the cases, but in view of the fact that in *The People v.*

Grover, the very ordinance which is attacked in the case at bar was held invalid distinctly for the reason that it provided for the laying of disconnected pieces of sidewalk upon different streets, and therefore was for "a double improvement," instead of a single one, it is not satisfactory to us. While it might be argued that the decisions in the *People v. Latham* and the *People v. Grover* do not preclude an ordinance being valid which might provide for a connected piece of sidewalk around a corner, although upon two streets, they render it certain that neither the ordinance in question here, nor any like it can be valid.

It is needless for us to proceed further with the discussion of the judgment and tax sale under which the certificates enjoined by the decree in this cause were issued. If the ordinance was invalid for the reason given, there was no power in the municipality to make the improvement, and no force whatever in the proceedings of the village clerk in levying the supposed tax to fix a lien on the appellee's land.

The fact that objections were not made in the County Court gives no validity to the pretended tax. It does not matter, therefore, whether the point made by appellant that no bill of cost of the improvement need be returned to the county collector, is well taken or not. It may be remarked, however, that appellant admits that there must be a bill of costs filed *in the office of the village clerk*, certified to by the officer in charge of the construction. A finding of the decree is "that the provision of Section 3 of an Act to provide additional means for the construction of sidewalks in cities, towns and villages, approved April 15, 1875, in force July 1, 1875, was not complied with, in that no bill of costs was made, filed or returned, *as provided in said section and other sections of said act*," and there does not seem to be an assignment of error that this finding is unsupported by the evidence.

The appellant objects to the decree because it does not provide for compensation to the holder of the certificates. This does not make the decree erroneous.

Where, as here, there never was a valid tax laid on the

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premises, it is not a condition precedent to enjoining a deed or cancelling the certificates, that anything should be paid to the holder. It would have been erroneous to have compelled it. *Glos v. Collins*, 110 Ill. App. 121; *Boals v. Bachmann*, 201 Ill. 340; reversing the Appellate Court of the Third District in *Boals v. Bachmann*, 103 Ill. App. 427, cited by appellee.

The decree of the Superior Court is affirmed.

Affirmed.

Charles B. Pavlicek, executor, v. Katarina Roessler.

Gen. No. 11,761.

1. JUDICIAL NOTICE—*of what taken.* Judicial notice will be taken of matters constituting a part of the record in a cause.

2. ORDER—*when impropriety of, will not reverse.* Where a part of an order is improper, such order will not be reversed where such improper part may be rejected as surplusage without changing the effect of the order.

3. WIDOW'S AWARD—*when ante-nuptial contract does not release.* An ante-nuptial contract does not bar the right to a widow's award where it does not specifically release the same or employ words capable of such construction.

Contest in court of probate. Appeal from the Circuit Court of Cook County; the Hon. FREDERICK A. SMITH, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1904. Affirmed. Opinion filed June 20, 1905.

H. B. SPURLOCK, for appellant.

JOHN REID McFEE, for appellee.

MR. PRESIDING JUSTICE BAKER delivered the opinion of the court.

The question in the case is whether the ante-nuptial contract between appellee and her deceased husband, Joseph Roessler, is under the facts of the case, a bar to her right to a widow's award in his estate. The decision of the Probate Court was that it was not a bar and the appraiser's esti-

mate of one thousand dollars as the widow's award in his estate was approved by that court and ordered to be recorded. The Circuit Court, upon appeal, ordered that said order of the Probate Court be approved and confirmed and also that the appraiser's estimate of the widow's award in said estate be approved and recorded, and from this order the executor of the will of Joseph Roessler prosecutes this appeal.

Appellee contends that as the trial in the Circuit Court was *de novo* there was no order of the Probate Court to "confirm and approve," and therefore so much of the order and judgment appealed from as approves and confirms the order of the Probate Court was improper, and further contends that so much of said order as orders that, "the appraiser's estimate of the widow's award in the estate of said deceased be approved and recorded," was improper because no appraiser's estimate of the widow's award was put in evidence.

The appeal to the Circuit Court was from the order that the appraiser's estimate of the widow's award be approved and recorded.

The transcript filed in the Circuit Court on that appeal became a part of the record of the cause in the Circuit Court. That transcript properly contains a copy of the record of the appraiser's estimate of the widow's award. The Circuit Court took judicial notice of the appraiser's estimate of the widow's award, because it was a part of the record in the cause, and it was not necessary to put it in evidence. 1 Wharton on Evidence. sec. 325; Secrist v. Petty, 109 Ill. 188.

If the contention of the appellant be conceded that so much of the order and judgment of the Circuit Court as orders that the order of the Probate Court, "be approved and confirmed" was improper, still the contention will avail him nothing for the Circuit Court also ordered that the appraiser's estimate of the widow's award "be approved and recorded."

The principal contention of appellant is that the court erred in holding that appellee by the ante-nuptial contract, taken in connection with the facts agreed upon at the trial, did not waive her right to a widow's award in the estate of

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her deceased husband. The ante-nuptial contract between Roessler of the first part and appellee of the second part, begins with a recital that each had certain personal property and also certain real estate therein described, and that a marriage was intended between them, and that it had been and was agreed between them, "that each of them shall and will mutually waive and release all right and interest that they and each of them may have in and to the property of the other." The agreement of Roessler to release and waive all interest in the property of appellee is then set out and then follow the covenants of appellee as follows:

"And the said party of the second part, in consideration of the premises above recited, and the covenants of the said party of the first part hereinbefore set forth, does hereby remise, release and relinquish unto the said party of the first part, his heirs, executors, administrators, devisees and assigns, all her right and interest, of any kind and nature whatsoever, and especially her contingent right of dower and homestead in all lands of which the said party of the first part is now seized, or of which he may hereafter become seized; and doth hereby covenant to and with the said party of the first part, his heirs, executors, administrators, devisees and assigns, that in the event she should survive the said party of the first part she will not sue for, claim or demand any right of dower or other interest whatsoever in or out of any and all real estate of which the said party of the first part may die seized, or to which he may be entitled at the time of his death, either in possession, reversion, remainder, or otherwise.

And, for the consideration aforesaid, the said party of the second part does hereby release and relinquish unto the said party of the first part, his heirs, executors, administrators and legatees, all right, title and claim to any and all distributive share or portion of the personal estate of which the said party of the first part may be possessed, or to which he may be entitled, in remainder, reversion, or otherwise; and does hereby covenant and agree to and with the said party of the first part, his heirs, executors, administrators

and legatees, that in the event she should survive the said party of the first part she will not sue for, claim or demand any distributive share or interest, whatsoever, to which she might be entitled as the surviving widow or wife of the said party of the first part, in or out of any and all personal estate of which the said party of the first part may die possessed, or to which he may be entitled at the time of his death, in reversion, remainder, or otherwise."

The facts agreed upon were that the parties were married the day after the contract was made; that the husband died three years after the marriage; that no children were born of the marriage; that neither husband nor wife had at the time of the husband's death a minor child living; that the husband at the time of his death was living separate and apart from his wife; that a bill for separate maintenance filed by the wife was then pending; that the personal estate of the deceased husband was of the value of \$22 and his real estate of the value of \$3,000, encumbered by a mortgage for \$600.

That appellee might have waived her right to a widow's award in the estate of her deceased husband, if she survived him and had no minor child living at her death, is not disputed. In *Weaver v. Weaver*, 109 Ill. 225, the contract was that there should be paid to the widow, if she survived her husband, \$12,000, "in lieu of dower or widow's portion" and it was held that "widow's portion" in that connection meant widow's award. In *McMahill v. McMahon*, 113 Ill. 461, the contract in express terms waived the widow's award. In *Phelps v. Phelps*, 72 Ill. 545, the clause which it was insisted barred the right to a widow's award was as follows: "It is agreed that the property of each shall be kept separate and distinct, held and enjoyed by each separately and distinctly, by each in the same manner as if they were and had continued unmarried; and upon the death of either party his or her real estate and personal property shall pass to his or her heirs, executors or administrators, free from all claim and survivor." In that case it was said (p. 547): "Treating the provision which the law makes for the widow

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and children residing with her, by the allowance of specific articles of property, as a means of support, it cannot be said to be an interest in the property of itself of the husband. It comes within no definition of property. It is a benefit created in their favor by positive law and adopted for reasons deemed wise and politic.

The ante-nuptial agreement in this case makes no allusion to their rights. Hence it cannot be said that the petitioner has released her rights to the benefits of the obligations imposed upon her husband and his estate which are to enure to her and her family in case of his death."

The language of the contract in the Phelps case is broader and more sweeping than any found in the contract in this case. The ante-nuptial agreement in this case, as in that, makes no mention of appellee's right to a widow's award. Nor are there in the contract in this case words that can be construed to refer to or mean the widow's award. The word "portion" in the phrase "distributive share or *portion* of the personal estate," etc., cannot be held to refer to or include the widow's award. It means the distributive portion, the distributive share of his personal estate to which she would be entitled under the statute of Descent and Distribution. In that statute it is provided that in a certain contingency the estate shall be divided in equal parts among the parents, brothers and sisters of the deceased, "allowing to each of the parents, if living, a child's part or to the survivor of them, if one be dead, a *double portion*."

By the terms of the contract appellee waived only interests and rights in the property of her husband. That her right to a widow's award in the estate of her deceased husband is not an interest in the property itself of the husband, was expressly decided in Phelps v. Phelps, *supra*, and upon the authority of that case the order and judgment of the Circuit Court in this case must be affirmed.

Affirmed.

MR. JUSTICE SMITH took no part in the decision of this case.

**People of the State of Illinois, for use of Minnie
Phillips, v. Olaf F. Severson.**

Gen. No. 11,848.

1. *APPEAL*—when Appellate Court has no jurisdiction of. The Appellate Court has no jurisdiction of an appeal which presents for consideration the validity of a statute.

Action of debt. Error to the Circuit Court of Cook County; the Hon. EDWARD O. BROWN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1904. Appeal dismissed. Opinion filed June 20, 1905.

DAVID GILMOUR, for plaintiff in error.

WILLIAM CHONES, for defendant in error.

MR. PRESIDING JUSTICE BAKER delivered the opinion of the court.

This is a writ of error sued out by the plaintiff in an action brought in the Circuit Court, to reverse a final judgment of that court in said action for the defendant on demurrer to the declaration. The declaration is in debt to recover fines or penalties imposed by sections 213 and 214 of chapter 38, R. S., Hurd's Ed., for a great number of alleged violations by the defendant of said Section 213. Said sections are as follows:

213. "If any officer authorized by law to charge or receive fees, salary or pay shall charge, claim, demand or take any greater fee, salary or pay than such as is by law allowed to him for the services performed * * * he shall, on conviction under this section, for the first offense, be fined in any sum not less than \$25 nor more than \$200, and upon conviction for a second or any subsequent offense, under this section, he shall forfeit his office and shall be confined in the county jail not less than thirty days nor more than one year."

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214. "Any officer who violates the provisions of the preceding section shall, in addition to the penalty therein provided, be fined for each item so charged, collected or received not less than \$10 nor more than \$100, to be sued for and recovered before any justice of the peace of the proper county, in an action of debt, in the name of the People of the State of Illinois, and for the use of the person against whom such fee is charged, or from whom the same is received or collected."

The right of action by the People for the use of the person aggrieved to recover against the defendant in an action of debt a fine or penalty for each illegal item of costs charged against or collected from such person by a justice of the peace was created by said section 213. No such action could be maintained, but for the provisions of that section. But the same section which gives the right of action provides the remedy for its enforcement. Such fine or penalty is, "to be sued for and recovered before any justice of the peace of the proper county in an action of debt."

In *Smith v. Drew*, 5 Mass. 513-514, Chief Justice Parsons said: "When a statute creates a new right without prescribing a remedy, the common law will furnish an adequate remedy, to give effect to the statute right. But when a statute has created a new right, and has also prescribed a remedy for the enjoyment of that right, he who claims the right must pursue the statute remedy." See to same effect *Brown on Jurisdiction*, 37; *Conrad v. Starr*, 50 Iowa, 470; *Clark v. Brown*, 18 Wend., 213.

This court is without jurisdiction to pass upon the validity of a statute. The statute creates a liability, which did not exist at common law and at the same time provides a specific mode in which such new liability shall be enforced, viz., that the fine or penalty thereby imposed is "to be sued for and recovered before a justice of the peace in an action of debt," etc. The remedy thus provided must under the authorities be held to be the only remedy to which the party aggrieved can resort to recover the penalty imposed by the statute.

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In the brief of counsel for plaintiff in error it is said that it is well settled that the "Jurisdiction of the Circuit Court, so far as conferred by the constitution, cannot be taken away, nor can it be changed or abridged by an act of the Legislature," and in support of this contention *Berkowitz v. Lester*, 121 Ill., 106, and other cases are cited. The question thus presented involves the validity of a statute. When the constitutionality of a statute is involved we have no jurisdiction to review the proceedings as to any question presented by the record. *Williams v. The People*, 118 Ill., 444; *Graham v. The People*, 35 Ill. App., 568; *Bernstein v. The People*, 70 ib., 175.

The writ of error must therefore be dismissed.

Writ of error dismissed.

Lauritz E. Rosenbom, et al., v. Andrew Renk.

Gen. No. 11,868.

1. BILL OF EXCEPTIONS—*when properly signed*. A judge elected for another circuit may properly sign a bill of exceptions as a judge of the Superior Court of Cook County where he heard the cause, sitting as such a judge.

2. BILL OF EXCEPTIONS—*what not essential to validity of*. A bill of exceptions need not be settled and signed in the county in which the case is tried.

Action on the case for personal injuries. Error to the Superior Court of Cook County; the Hon. GEORGE W. THOMPSON, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1904. Reversed, with finding of facts. Opinion filed June 20, 1905. Rehearing denied July 7, 1905.

ELMER H. ADAMS, for plaintiffs in error.

THOMAS E. ROONEY, for defendant in error.

MR. PRESIDING JUSTICE BAKER delivered the opinion of the court.

The defendant in error moved to strike from the record

the bill of exceptions and his motion was denied, but as counsel on both sides have in their briefs argued the questions presented by the motion, we deem it proper to state the grounds upon which the motion was denied.

The *placita* shows that the case was tried before George W. Thompson, a judge of the Ninth Judicial Circuit, holding a branch court of the Superior Court of Cook county, and the bill was signed, "George W. Thompson (Seal.), Judge of the Superior Court of Cook county, Illinois." This we think was sufficient. Judge Thompson was, it is true, a judge of the Circuit Court of the Ninth Circuit, but he presided at the trial of this cause as a judge of the Superior Court and might properly sign the bill of exceptions as judge of the Superior Court.

It is also said that the bill of exceptions was settled and signed at Galesburg in Knox county. The settling of a bill of exceptions is a judicial act, so is the order that a *capias ad respondendum* issue a judicial act, but each is the act of the judge and not of the court. A bill of exceptions is authenticated by the judge by signing and sealing the same and it then, by the provision of the statute, becomes a part of the record in the cause. The order for a *capias* is indorsed under the hand of the judge, on the affidavit, and no order of court is made in either case. The jurisdiction of circuit judges is coextensive with the state. They have the same official powers in one county as in another. Settling or signing a bill of exceptions does not require the machinery of a court. In *Sup. Court Ind. Order of Foresters v. Knowles*, 113 Ill. App., 641, we held that a bill of exceptions might be settled and signed in a county or circuit other than that in which the cause was tried. The motion to strike out the bill of exceptions was properly denied.

This is a writ of error sued out by the plaintiffs in error, to reverse a judgment for \$600 recovered against them by the defendant in error in an action on the case for personal injuries alleged to have been sustained by him by reason of their negligence. The defendants carried on a shop, in the basement of which they had a gas engine of fifteen horse

power. The frame or bed of the engine was of iron and was about ten feet long, two feet wide and one foot deep and may be considered a box or trough, without a cover. Upon the top of the frame, at its north end was fastened the cylinder. The north end of the cylinder was the closed end. Upon the top of the frame of the engine near its south end were fastened the bearings of the shaft of the fly-wheels. The fly-wheels were six feet in diameter, placed one on each side of the frame. They passed below the level of the floor of the room and extended beyond the south end of the frame. In the middle of the fly-wheel shaft, over the box or trough made by the frame of the engine, was a double crank four inches long. The motion of this crank, when above the line of the shaft, was away from the cylinder towards the south end of the frame. The frame was only long enough to permit the crank to pass downward just inside the south end of the frame. To start the engine it was necessary to turn the fly wheels in order to compress the air in the closed end of the cylinder before the gas was ignited. This was done at least twice a day and frequently several times in a day and when it was done the belt was always thrown off from the tight pulley on to a loose pulley.

On the day that plaintiff was injured when the engine was stopped for the night, it so happened that the belt was not thrown off from the tight pulley. Lauritz Rosenbom, one of the defendants, called to the plaintiff to go with him to the basement and help to throw off the belt. They went to the basement and each took hold of the west fly-wheel to turn it. Plaintiff stood between the fly-wheel at the south end of the frame of the engine with his left foot on the floor and his right foot on the edge of the south end of the frame with part of his foot projecting over the inside of the frame. Standing in that position plaintiff and Lauritz Rosenbom, who stood west of the fly-wheel, pulled upon the wheel to turn it and as it turned the crank necessarily turned with it and as the crank came down inside of the south end of the frame it struck the right foot of the plaintiff, thereby causing the injuries complained of.

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The plaintiff had worked for the defendants five years before his injury. He was thoroughly acquainted with the construction and operation of the engine. He testified that for three years he had helped to start it, sometimes in the morning, sometimes at noon and sometimes twice a day, and that he once helped to take it apart and clean it. He further testified that he knew that the inside of the iron frame or base was hollow; that the crank as it went around went inside the iron frame, and that knowing this he put his foot on the upper edge of the frame and when the crank came around his foot was sticking over the edge of the frame and the crank as it came around struck his foot and crushed it. The only excuse for or explanation of his act that he gave was, "That it was so dark that you could not see how far you put your foot." Rosenbom took with him when he and the plaintiff went into the basement a lighted lantern, and plaintiff testified that this lantern at the time of the accident stood on the floor near the fly-wheel. The fact that the room was poorly lighted furnished no excuse for the act of the plaintiff in placing his foot upon the edge of the iron frame in such a position as that a part of his foot projected beyond the inner edge of the frame. He could tell by the sense of touch what part of his foot rested and pressed upon the edge of the frame and what part of it projected beyond the frame into the space through which he knew that the crank must pass at every revolution of the shaft. The act of the plaintiff in placing his foot where he did place it must under the evidence in this case be held a negligent act that directly contributed to his injury.

The judgment of the Superior Court will be reversed with a finding of facts.

Reversed with finding of facts.

Anderson E. Martin, et al., v. George Todd, et al.

Gen. No. 12,152.

The decision in this case on the merits is controlled by the decision in *W., St. L. & P. Ry. Co. v. Peterson*, 115 Ill. 597.

1. **APPELLATE COURT**—*how record of, cannot be affected.* The record of the Appellate Court cannot be contradicted, varied or explained by evidence beyond or outside thereof.

Bill in chancery. Error to the Superior Court of Cook County; the Hon. AXEL CHYTRAUS, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1905. Final judgment on demurrer for defendant in error. Opinion filed June 20, 1905.

HENRY D. BEAM and WALTER G. FRENCH, for plaintiffs in error.

JAMES J. BARBOUR and FURBER WAKELEE, for defendants in error.

MR. PRESIDING JUSTICE BAKER delivered the opinion of the court.

This is a writ of error sued out by the plaintiffs in error against George Todd and Wabash Shoe Company, defendants in error, to reverse a decree of the Superior Court rendered May 7, 1902, in favor of defendant in error Todd against plaintiffs in error in a chancery cause wherein defendant in error Todd was complainant and the plaintiffs in error and defendant in error Wabash Shoe Company were defendants. The writ was made returnable to the present term of this court and the defendants in error appeared and pleaded a plea in bar of the writ. The plea alleges that the plaintiffs in error prosecuted an appeal to this court from the identical decree of the Superior Court mentioned in the proceedings in this case and assigned on the record the same error assigned in this case; that such proceedings were had on said appeal that on October 26, 1903, it was considered by this court that neither in said record and proceedings nor in the rendition of said decree was there any error, and that said decree be affirmed notwithstanding the matters therein assigned for error, and that defendants in error re-

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cover of plaintiffs in error their costs; that a petition for a rehearing of said cause was filed by said plaintiffs in error and denied; that said plaintiffs in error prosecuted from the judgment of this court on appeal to the Supreme Court and that the Supreme Court June 23, 1904, rendered a judgment that in said record there was no error and that the said judgment of this court be affirmed in all things, notwithstanding, etc., and that said judgment of this court and of the Supreme Court remain in full force, etc. To this plea the plaintiffs in error demurred and their demurrer was overruled. A replication was then filed in which it was averred that neither in the judgment of this court nor in the order denying a petition for a rehearing, nor in said former proceedings of this court pleaded in said plea did this court consider, decide or adjudicate upon the merits of said cause or of said appeal, nor did the Supreme Court in or by the said judgment pleaded in said plea, consider, decide or adjudicate upon the merits of said cause or of said appeal. To the replication the defendants in error have demurred.

Plaintiffs in error also present and ask leave to file three additional replications. Omitting the formal part, the first of these replications avers that the record upon which the judgments of affirmance were rendered in this court and in the Supreme Court was not the same record but other and different from the record in this case. The second avers that the record on said former appeal was insufficient and incomplete and that by reason thereof neither this court nor the Supreme Court did consider or adjudicate upon the merits of said cause or of said appeal. The third denies that the record on said former appeal was the same record as that upon which this writ of error is sued out.

In *W., St. L. & P. Ry. Co. v. Peterson*, 115 Ill., 597, the plea of the defendant in error in the Appellate Court was in substance the same as the plea in this case, and a demurrer to the plea was overruled. Plaintiffs in error then filed four special replications in which it was averred, in substance, that the merits of the controversy between the parties were not heard and determined by the Appellate Court on the

former appeal, because through the fault of the clerk in making up the transcript of the record of the Circuit Court, to be submitted to the Appellate Court, the bill of exceptions which was a part of the record of the cause in the Circuit Court was not transcribed and made a part of the transcript of the record filed on the former appeal in the Appellate Court, by reason whereof the record presented to the court on said writ of error was not before that court on the former appeal, and therefore said court could not and did not on such appeal decide upon and determine the errors assigned on said writ of error. The Appellate Court sustained a demurrer to said replication. Final judgment was rendered against the plaintiff in error in the Appellate Court and the judgment of that court was affirmed by the Supreme Court. In the opinion Mr. Justice Scott said (p. 601): "There was no error in the decision of the Appellate Court in overruling the demurrer to the plea filed by the defendant in error in that court. Conceding the facts alleged in the plea to be true, they constitute a complete bar to the present suit. Nor was there any error in sustaining the demurrer to the four special replications. The matters alleged cannot be proved as an answer to the plea of the defendant in error."

The decision in the case just cited must control the decision in this case.

The demurrer to the replication will be sustained and leave to file the additional replications will be denied.

The judgment of this court upon the former appeal was that the decree which we are now asked to review be affirmed. That judgment has been affirmed by the Supreme Court. The sole ground stated by counsel for plaintiffs in error in argument upon which we are asked to re-examine that decree is that upon the former appeal the court held that the original master's report of the evidence taken by him was not a part of the transcript of the record of the cause then presented to the court for review. But the record of this court cannot be contradicted, varied or explained by evidence beyond or outside of the record. *W., St. L. & P. Ry. Co. v. Peterson, supra.*

We are unable to see in the suggestions of counsel for plaintiffs in error any fact which can be pleaded as an answer to the plea, and final judgment will therefore be rendered on the demurrer.

Final judgment on demurrer for the defendants in error.

Thomas G. Otis v. Cottage Grove Manufacturing Company.

Gen. No. 11,717.

1. **EXCEPTIONS**—*when objections before master treated as.* Where the parties to a cause treated objections filed before the master as exceptions filed before the court, the Appellate Court will likewise so treat them, notwithstanding the absence of an order making such objections exceptions.

2. **LIQUIDATED DAMAGES**—*when clause of contract does not provide for, or for penalty.* A clause in a building contract as follows: "The owner shall withhold the sum of \$10 per day for each day that any portion remains undelivered at the expiration of the above time limit," in connection with a further clause as follows: "The owner agrees to reimburse the contractor for any loss owing to his delay; the contractor agrees to make good to the owner any damage caused by his delay,"—merely provides for the payment of actual damages and is not a provision either for a penalty or for liquidated damages.

Mechanic's lien proceeding. Appeal from the Superior Court of Cook County; the Hon. MARCUS KAVANAGH, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1904. Reversed and remanded with directions. Opinion filed May 5, 1905. Rehearing denied June 23, 1905.

Statement by the Court. Appellant, in 1901, built on certain premises owned by him, an apartment house. Appellee furnished the mill work for said building under a written contract with appellant. Appellee filed against appellant a bill in the Superior Court to enforce a mechanic's lien on said premises for a balance claimed to be due for work and materials furnished to said building under said

contract. The defendant answered the bill and the cause was referred to a master to take and report proofs with his conclusions thereon. The master found that nothing was due to the complainant and recommended that the bill be dismissed for want of equity. Forty-nine objections were taken by complainant to the report of the master and all of them but one were overruled by him. The record does not contain any order that such objections stand as exceptions, nor were any other exceptions to the report filed in the Superior Court. The objections were, however, treated by both parties in the Superior Court as exceptions to the report of the master and the court in the final decree ordered: "That the exceptions to said master's report in so far as the same relate to the matters and things covered by the findings of this decree and are in harmony therewith, be and the same are hereby sustained, and the said master's report in so far as the same conflicts with the findings of this decree is hereby overruled; in all other respects the said exceptions are hereby overruled and the said master's report is hereby sustained."

The decree was in favor of the complainant for the full amount claimed in the bill, including extras, interest and solicitors' fees, and from this decree the defendant, Thomas G. Otis, prosecutes this appeal.

WHEELOCK, SHATTUCK & NEWAY, for appellant.

HERMAN W. STILLMAN, for appellee.

MR. PRESIDING JUSTICE BAKER delivered the opinion of the court.

As the parties in the Superior Court treated the objections before the master as exceptions in that court, we will so consider them, although no order to that effect appears to have been made. A decree should in plain terms state which of the exceptions to the report of the master are sustained and which are overruled. We shall not undertake to say which of the forty-eight exceptions in this case were overruled and which sustained by the chancellor, but proceed to announce

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our conclusions as to the merits of the controversy presented by this record.

The contract provided that the work thereby agreed to be done should be completed by August 1, 1901, and it was not completed until October 17, 1901, though some apartments in the building were ready for occupancy on October 1. The clause of the contract which provided that all the work and materials under the same should be done and furnished by August 1, 1901, proceeded as follows: "The owner shall withhold the sum of ten dollars per day for each day that any portion remains undelivered after the expiration of the above time limit." A subsequent clause of the contract provides as follows: "The owner agrees to reimburse the contractor for any loss owing to his delay. The contractor agrees to make good to the owner any damage caused by his delay." The clause in the contract above set forth providing that the owner should withhold ten dollars per day for each day that the contract remained uncompleted after the time of completion fixed by the contract, was held by the master to be a stipulation for liquidated damages and by the chancellor a penalty. In our opinion the clause is neither a stipulation for liquidated damages nor a penalty. Construing that clause with the subsequent clause of the contract relating to the same subject-matter, the contract must be held to provide that the owner may withhold in case of such delay by the contractor, from the eighty-five per cent the contractor was entitled to receive as the work progressed, ten dollars per day for each day of such delay, until the completion of the contract, and then, take from the amount so withheld the amount of the damages he sustained by reason of such delay.

The building was to be completed by September 1, 1901. The master in his report found that the delay in the completion of the building by September 1 was caused by the failure of the complainant to furnish the mill work within the time limited by its contract; that the café and twelve of the sixteen apartments in said building were leased by the owner at certain sums per month, the occupancy to begin

September 1; one from September 20, and two were not rented; that by reason of said delay of the complainant, of the apartments so rented from September 1 nine were not ready for occupancy until October 1, one not until October 7, one and the café not until October 10, one not until November 1, and the apartment rented from September 20 was not ready for occupancy until October 15, and that through his inability to deliver the said apartments until the dates above mentioned the owner suffered an actual loss on account of rents rebated and lost amounting to \$532.98. These findings are abundantly supported by the evidence, and the finding contained in the decree, that the delay of the complainant to complete its contract within the time fixed by the contract, was caused by delays on the part of other contractors, is not supported by the evidence.

The complainant furnished certain extras for which it was agreed between the parties, that it should be paid \$39.25. It made a claim for another bill of extras amounting to \$52.25, upon the ground that mill work of that value was required to complete the contract, in excess of the amount it estimated would be so required when the contract was made. This claim must be disallowed. The defendant made a claim for \$250 upon the ground that part of the mill work was delivered in an unfinished condition and that he paid out that sum to properly finish the same. The evidence, in our opinion, does not support this claim and it must be disallowed. The contract price was \$3,600, the extras \$39.25, making the total sum the complainant was entitled to \$3,639.25. The complainant was paid \$2,939.25. The defendant is entitled to \$532.98 damages against the complainant, making a total \$3,472.23, and the balance due complainant is \$167.02. The complainant is entitled to a decree for this amount and costs.

The decree of the Superior Court will be reversed with directions to enter a decree for the complainant for \$167.02 and for the costs taxed in said decree with the exception that the attorneys' fees of the complainant will be reduced from \$86 to \$16.

Reversed and remanded with directions.

Crouse v. McCandless.

John A. Crouse v. Archibald W. McCandless.

Gen. No. 11,819.

1. **PARTNERSHIP**—*when right exists to return of premium upon dissolution of partnership prior to term fixed.* The general rule is that where a partnership is created for a specified time and determined by a dissolution by mutual consent before the expiration of that time, then in the absence of a provision in the original articles of agreement for return of any part of the premium upon any contingency, the party who paid it is not entitled to the return of any part of it unless the dissolution agreement, as in this case, so provides.

2. **PARTNERSHIP**—*what equity will consider in fixing terms of dissolution.* Where parties have agreed to dissolve a partnership but have left the terms of dissolution for further agreement between themselves, upon their failing to agree, a court of equity will fix such terms and, in such connection, will inquire into the matters preceding the agreement by which the dissolution was effected, will examine the contract of partnership to ascertain if there was any fraud in its inception, and consider such other matters as will aid it in making an equitable adjustment.

Bill for accounting, etc. Appeal from the Superior Court of Cook County; the Hon. JESSE HOLDOM, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1904. Reversed and remanded. Opinion filed June 20, 1905.

Statement by the Court. This is a bill for an accounting and other relief between former partners. The copartnership was evidenced by an agreement in writing dated March 31, 1896, signed by each of the parties. The agreement recites among other things that appellant had been engaged in the practice of dentistry in Chicago over twenty-seven years and had built up a large business; that appellee had been a dentist in Chicago three years, and that the good will of appellant's business was agreed to be valuable and worth with his time about \$50,000; that appellant on account of other business was desirous of liberty to devote only such part of his time as he might deem proper to the copartnership business, and therefore made a concession as to the value of his business of about \$10,000, which the parties agreed to; that the partnership should commence April

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1, 1896, and continue five years, and that the parties were to share all expenses and earnings equally. It was agreed that appellee should pay appellant \$15,000 "for the said copartnership and interest in the practice and business," of which sum according to the contract, "he has paid by conveyance of certain real estate, \$10,350, leaving \$4,650 to be paid out of his share of the net income, which shall be paid to party of the first part (appellant) over and above \$5,000 per annum until paid."

After an experience of eighteen and one-half months, the parties concluded that the partnership should be discontinued and executed the following:

"Chicago, Oct. 15, 1897.

"We, the undersigned, wish to dissolve the partnership in the practice of dentistry now existing under the name of Crouse & McCandless by mutual consent, the terms of dissolution and settlement to be agreed upon hereafter, but the dissolution to take effect the 1st of October last.

(Signed) J. A. CROUSE,
A. W. McCANDLESS."

The bill states that the complainant (appellee) deeded certain real estate to appellant at an agreed valuation of \$10,350 and gave his promissory note for \$4,650 in payment of the premium which by the articles of copartnership he was to pay appellant for the interest acquired in the business, which real estate and note appellant still retains. Appellee prays for an accounting both as to the earnings of the copartnership and the premium paid by appellee, and that appellant be decreed to cancel and surrender the note received by him from appellee and "either be compelled to deed complainant the real estate given him or pay the complainant the value thereof."

The decree finds the equities with the complainant and recites that after the dissolution by agreement, the parties were unable to agree upon the terms of dissolution, that complainant insisted as shown by his bill, that the articles of copartnership should have been rescinded for fraud and that

he should be permitted to have a return of the bonus paid and an equal share of the earnings; that defendant had offered to deed back to complainant the property conveyed to him, and to return to complainant his note for \$4,650 upon complainant paying to defendant such proportion of the premium or bonus as the period of copartnership (one year and six months) bore to the whole term of five years mentioned in the partnership contract. The court finds that there was no such fraud as entitled complainant to set aside and rescind the contract of partnership, but that the dissolution was without fraud or misconduct of complainant, and that the latter is entitled to recover the unearned part of the premium in the proportion which eighteen months, during which the partnership continued, bears to five years, the time provided for its continuance by the articles of agreement; and that this unearned portion of the bonus is \$10,500, for which amount complainant is entitled to credit in the accounting. The court also finds, there being apparently no controversy in this regard, that appellant has in his hands \$3,712.14 of the receipts of the partnership over and above his share, which sum is due from him to appellee.

JOHN S. COOPER, for appellant.

ASHCRAFT & ASHCRAFT, for appellee; E. M. ASHCRAFT, of counsel.

MR. JUSTICE FREEMAN delivered the opinion of the court.

The bill of complaint alleges that appellant misrepresented to appellee the value and good will of his business before the partnership was formed, and that afterwards appellant violated the terms of the partnership agreement. Appellee claims therefore to be entitled to rescind the original articles of partnership for fraud, and to be entitled to recover the entire bonus or premium which he agreed to pay and also such share of the profits not less than one-half as in equity the court may find him entitled to. The decree, however, does not sustain this contention. It finds that under the evidence appellee is not entitled to have the original contract

set aside and rescinded for misrepresentation or fraud, but finds also that appellant's conduct while the partnership continued made it necessary for appellee to consent to the dissolution, and it awards appellee the unearned portion of the premium.

It is contended in behalf of appellant that appellee is not entitled to the return of any part of the premium, the co-partnership having been dissolved by mutual consent, and that the decree is erroneous in that respect. By the agreement of the parties dated October 15, 1897, the dissolution by mutual consent took effect the first of that month. The matters left open by that agreement were "the terms of dissolution and settlement to be agreed upon hereafter." These terms the parties have been unable to agree upon and because of the failure so to agree it becomes necessary under this bill for a court of equity to do for them what they are unable to do for themselves. So far as necessary for that purpose the court may inquire into matters preceding the agreement by which the dissolution was effected. It may examine the contract of partnership, inquire whether there was any fraud in its inception entitling appellee to have it rescinded, and into such other matters as will aid in an equitable adjustment of these "terms of dissolution and settlement." But the chancellor having found, and we think correctly, that there was no fraud in the inception of the partnership, it became immaterial to inquire into the disagreements or differences which arose between the partners while the partnership continued. This is not a bill for dissolution. The parties themselves agreed in writing to dissolve and did dissolve the partnership. They had a right to so agree, and having done so of their own accord it is of no consequence what the reasons were which led them to so agree. We are not called upon to weigh in the balance their conduct toward each other as partners and apportion with nice precision the share of blame, if any, to be attached to each. So far as the decree endeavors to do this it must be regarded as erroneous, and we shall not undertake, therefore, to review the evidence upon which such findings are based. The ques-

tion as to appellee's right to a return of the premium does not depend upon the conduct of the parties toward each other during the partnership. As we have said, this is not a case where a partnership is to be dissolved by a court of equity upon complaint of either party. The dissolution is an accomplished fact brought about by the parties of their own accord and by mutual consent. In *Lee v. Page*, 30 Law Jour. Chancery, 857-858, where similar conditions existed, the court said: "This was an unconditional dissolution by agreement, and neither party could afterwards enter into any question of what the conduct of the other had been, or insist upon his right adversely, such right having been abandoned by the unconditional dissolution." In that case it was held that the right to return of any part of the premium paid by one party to the other when the partnership was formed, would be determined by the articles of copartnership, and "on referring to the articles it appeared that no provision was made on that subject in the event of an adverse or other dissolution. Under these circumstances the plaintiff had no right to a return of any part of the premium." To the same effect is *Akhurst v. Jackson*, 1st Swans-ton's Reports, 85-89, where a partnership was determined by the bankruptcy of one of the parties before the expiration of the partnership period. The assignees of the bankrupt filed a bill against the other partners to recover unpaid installments of the premium which by the partnership contract the latter had agreed when the partnership was formed to pay the bankrupt, in consideration of being admitted into the business. The Master of the Rolls said: "The parties might have provided by their agreement" for the contingency which had arisen, "but no such provision is made." "Upon admission the whole price became, according to the terms of the agreement, *debitum in presenti*, although *solvendum in futuro*. In equity as well as at law the contract has been performed and the consideration has been paid." In *Lindley on Partnership*, Vol. 1, star page 66, cited by appellee's counsel in their brief, it is said: "Where a partnership is entered into for a specified time and is determined prematurely, the

first matter for consideration is whether the parties have come to any agreement on the dissolution. If they have, and if they have also provided for the premium, it must be dealt with according to the agreement; but if the agreement on dissolution is silent with respect to the premium, the inference is that the parties did not intend to deal with it nor to vary their rights to it under the original agreement." In the case at bar the parties have come to an agreement on the dissolution, and the general rule is that where a partnership is created for a specified time and determined by a dissolution by mutual consent before the expiration of that time, then in the absence of a provision in the original articles of agreement for return of any part of the premium upon any contingency, the party who paid it is not entitled to the return of any part of it unless the dissolution agreement so provides. *Astle v. Wright*, 23 Beavan 77, cited by appellee's counsel, was a bill for dissolution of partnership, instead of for a mere accounting, as here, following a dissolution by the parties by mutual consent. The same may be said of *Atwood v. Mande*, Law Rep. 3 Chan. App., 369-372; *Lyon v. Twiddell*, 17 Ch. Div. 529, and *Jauncey v. Knowles*, 29 Law Jour. Ch. 95.

In the case at bar, however, the rule referred to is no longer applicable, because when the parties agreed to dissolve they expressly provided in their agreement that "terms of dissolution and settlement" were left open to be agreed upon thereafter. While this provision does not expressly refer to the premium, its scope included all unadjusted matters of the partnership. The latter having been dissolved by agreement before the expiration of the term for which the bonus or premium was to be paid, such premium was only partly earned. A part of it was still unpaid. What part, if any, was so earned, its actual value, and the terms upon which it should be settled, were as properly comprehended within the "terms of dissolution and settlement to be agreed upon" as the division or sale of partnership assets, the undivided profits, or the collection of outstanding accounts. The parties themselves so construed it and acted accordingly, but

having failed to agree these matters are now to be equitably adjusted by the court to which they have been submitted for that purpose. Before the bill was filed appellant proposed as a basis of settlement the return to appellee of the latter's real estate and note, appellee to pay the proportion of the premium represented by the time the partnership had continued. The chancellor considered this an equitable basis of settlement and so decreed. It is not seriously contended on either side that if appellee is entitled to the return of any part of the premium, the decree is erroneous in this respect.

Appellant objects, however, most earnestly to the method which the decree adopts for repayment of the proportion of the premium to be returned to appellee. It is urged that while the bonus or premium was nominally \$15,000, it was in fact much less than that sum; that appellant accepted encumbered real estate in lieu of \$10,350 of the premium, that this real estate was not worth over and above the encumbrances to exceed at the highest estimate about \$3,000; and that the total premium agreed to be paid, including appellee's as yet unpaid note of \$4,650, did not exceed in value about \$7,650. The decree treats the premium as if the full \$15,000 had been paid in cash; and after deducting from it appellee's unpaid note of \$4,650 with interest thereon and directing the return of the note to appellee, deducting also the proportion which it is found appellant is entitled to retain of the premium earned during the eighteen months the partnership continued, the decree charges appellant with the sum of \$5,431.50, which he is required to pay back to appellee in money. Appellant complains that he is thus required to retain appellee's encumbered real estate as so much cash and is compelled to pay appellee \$10,350 for it instead of being allowed to return it as he received it, although it was never worth and is not now worth any such amount. We think this objection is well taken. There is evidence uncontradicted tending to show that the equities in the real estate in question were worth when conveyed to appellee from one to three thousand dollars. It is certainly inequitable to now compel appellant to retain them at a

valuation of \$10,350 unless such was his absolute unconditional agreement. If he is to be regarded as having agreed so to do appellee should also be regarded as having agreed to pay the whole \$15,000 premium absolutely and unconditionally, whether the partnership was prematurely dissolved or not. If the latter is entitled by reason of the dissolution agreement to have the "terms of dissolution and settlement" equitably adjusted and the unearned portion of the premium returned, appellant is equally entitled to a like equitable adjustment as to the real estate. He who seeks equity must do equity. To award appellant nominally the earned portion of three-tenths of the premium, while compelling him to return that portion of it represented by appellee's note for \$4,650, and at the same time to retain the real estate and pay appellee for it not only its full value, but several thousands of dollars in money beside, is in effect to deprive appellant of the entire premium, to give it all back to appellee and bestow upon the latter a large bonus beside. All the premium that appellee ever gave over and above his unpaid note, according to undisputed evidence, did not exceed \$3,000 in actual value of the real estate.

It would be difficult to devise a method more effectually to keep the word of promise to the ear and break it to the hope. The decree while pretending to award appellant three-tenths of the premium actually gives him nothing, and takes away from him even that which he hath. The amount which appellant is thus required by the decree to pay appellee in money is arrived at by charging the latter with \$418.50 interest on his said note of \$4,650 and with \$4,500 of the premium treated as earned for appellant in the eighteen months duration of the partnership, making \$9,568.50, which deducted from \$15,000 leaves appellee, it is said, entitled to recover from appellant \$5,431.50 to be paid by appellant in money. The same result is reached if to the three-tenths of the premium nominally awarded appellant—being \$4,500—is added the interest allowed him on appellee's note, making \$4,918.50, and this is deducted from \$10,350,

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the nominal valuation of the real estate. The result is to make appellant pay appellee \$10,350 for real estate worth perhaps about \$3,000. It appears from the evidence that when the articles of copartnership were under consideration it was agreed between the parties "that \$15,000 would be about a fair premium or bonus for a half interest—five year interest" to be paid by appellee; that the latter told appellant he did not have any money then and would have to turn over some land; that he proposed the two pieces of property subsequently conveyed to appellant subject to mortgages, one of \$4,500 bearing six per cent. interest and the other of \$5,000 bearing seven per cent. interest. Appellant states that he did not know anything about the value of this real estate, that he told appellee it was not so much the property, but appellee and his services, that he wanted. He had his brother-in-law look at the property and took it at the valuation stated, which was apparently fixed without consideration of the encumbrances. Appellee testifies that he originally paid for the equity in one of the pieces of real estate about \$5,000 in cash and \$2,000 for the equity in the other. The evidence tends to show, therefore, that the equities in real estate which appellant took as an equivalent for \$10,350 did not cost appellee to exceed \$7,000 when he originally acquired them, and the testimony is uncontradicted, as we have said, that the value at the time of the transfer to appellant did not exceed about \$3,000, and that at the time of the hearing the value had not at the most increased to exceed ten per cent. There is evidence tending to show that it has cost appellant to carry the property nearly \$2,000 more than he has received from it.

In his bill of complaint appellee prays that appellant be decreed to cancel and surrender the note of \$4,650 and "either be compelled to deed complainant the real estate given him or pay the complainant the value thereof." There is also a prayer for general relief. We are of opinion that appellee is entitled equitably to have the specific relief he prayed for, as to reconveyance of the land. He conveyed it to appellant at an estimated valuation of \$10,350. There

is evidence, as above stated, tending to show that it has not decreased in value since that time, and that there has been a slight increase. But whether so or not, it should be reconveyed to him by appellant and he should be charged therefor with the price, \$10,350, which he was allowed for it, and this should be credited on the \$10,500 to be returned to him as seven-tenths of the original premium or bonus which he agreed to pay. This will leave a balance of \$150 still due him on account of return premium, to which should be added the balance due appellee from appellant on account of surplus earnings, which the accounting shows to be \$3,712.14; making a total due appellee from appellant at date of dissolution of \$3,862.14.

The original articles of copartnership provided that the \$4,650 for which appellee gave his note to appellant should "be paid out of his share of the net income, which shall be paid to party of the first part over and above \$5,000 per annum until paid." The note drew interest at the rate of 6 per cent per annum. Appellant is entitled to the interest on the note to the date of dissolution. This was found to be \$418.50. He is also entitled to be paid the excess of appellee's "share of the net income" to the time of dissolution "over and above \$5,000 per annum." Appellee's share of this net income during the partnership was \$8,753.83 as found by the accounting. This exceeded the "\$5,000 per annum" or \$7,500 which he was entitled to retain for the eighteen months of partnership, to the amount of \$1,253.83. This excess added to the interest on the note (\$418.50) makes \$1,672.83 due appellant from appellee on the latter's note at the date of dissolution, which deducted from the \$3,862.14 due appellee from appellant as above stated leaves a balance of \$2,189.31 for which appellee is entitled to a decree.

He is further entitled to have the note delivered up and cancelled, inasmuch as the parties having agreed that it should be paid out of the excess of appellee's earnings, and with knowledge of that agreement having dissolved the partnership thereby making it impossible for it to be paid in

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that way, will be presumed to have intended to cancel so much of it as was not due and payable at that time. By this adjustment of the equities the agreement between the parties will be enforced substantially as they made it as nearly as may be. Appellee will receive back his real estate at his own estimate of its value and appellant will receive payment of so much of appellee's note as by his own agreements he is entitled to. On the basis of actual values each will receive about the proportion of the share of the nominal premium to which he is entitled. We are of opinion that under the circumstances appellant having had the management and control of the real estate is not entitled to be reimbursed for any excess of expenditures over receipts if any such there was, nor should he be compelled to account for any excess of receipts if there was any.

For the reasons indicated the decree of the Superior Court must be reversed and the cause remanded for proceedings not inconsistent with the views above expressed.

Reversed and remanded.

Myrtle G. Mahler, et al., v. Hercules Sanche.

Gen. No. 12,168.

1. **TRUSTEE**—*when contract does not establish relation of.* An agreement by which the complainant agrees to advance to another, goods, equipment and money to start in the business of selling complainant's instruments, and by which such other agrees to devote his time "to the interests of the business," to make settlements and to pay for advances, etc., does not constitute such other a trustee for the complainant.

2. **TRADE SECRET**—*when equity will protect.* Equity will protect by injunction a trade secret obtained by an employe in connection with his duties and by him communicated to others who seek to employ the same to the injury of its owner.

3. **BILL OF COMPLAINT**—*how construed.* The substance, rather than the form of the bill of complaint, will be looked to in order to determine the relief which will be granted and the basis thereof.

4. **LACHES**—*when defense of, applies, when not.* The defense of

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laches does not apply as against a continuing wrong, so far as the right to enjoin its continuance is concerned, but as to the damages, such defense may avail.

Bill for accounting. Error to the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1905. Reversed and remanded with directions. Opinion filed March 21, 1905. Rehearing denied June 23, 1905.

Statement by the Court. Defendant in error filed his bill of complaint averring in substance that he had at great expense devised a certain clinical instrument which he called "oxydonor," claimed to be useful in the treatment of disease, for which he had a large sale; that on or about March 15, 1895, he entered into a certain contract with one LaMotte Potter and in pursuance thereof furnished Potter with money and instruments in value amounting to more than \$3,000, together with advertising matter and lists of names; that Potter instead of opening an office for sale of complainant's instruments, as the contract provided, organized a corporation through which he proceeded to manufacture and sell a rival and imitation instrument, similar in appearance to the "oxydonor," to which he gave the name "oxygenor," holding it out as an improvement on the original instrument; that Mahler, one of the defendants, combined with Potter and they devised another instrument called "Perfected Oxygenor King," a very close imitation of the "Oxydonor" and which they made and sold with the money provided by complainant and on the reputation of complainant's instruments; that Potter subsequently sold out to Mahler and his associates and has since disappeared; that a copartnership called the Oxygenor Company was formed, of which Mahler and other defendants are members, and that the members of such copartnership are seeking to divert complainant's trade to their own profit, holding out the "Oxygenor" as being the latest improvement on the "Oxydonor" or as equal thereto, claiming that Potter as an employee of complainant became possessed of the complainant's secret formulae. The bill alleges that Mahler has admitted he acquired Potter's rights

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under the contract with appellee, and avers that defendants composing the Oxygenor Company took Potter's interest charged with full knowledge of the trust raised by said contract. Complainant prays that the contract of March 15, 1895, be construed as creating a trust against Potter and his assignees, for an order requiring them to turn over to complainant their business, books and accounts, for the appointment of a receiver and for an injunction.

Defendants except Potter answered denying the execution of the contract by Potter and denying that he ever opened an office in Chicago to carry out the terms of such alleged contract. They assert that Potter, knowing the "Oxydonor" to be inert, inoperative and a fraud on the public, devised a different instrument which he called the "Oxygenor," and which he publicly made and sold in Chicago from 1895 to 1898 without any attempt by complainant to claim or assert any adverse right; that in January, 1898, the other defendants formed a copartnership and bought out Potter in good faith and for value without notice of any alleged trust between Potter and complainant, and that Potter thereafter ceased to have any interest in defendants' business. They deny they ever stated that their instruments were those of complainant, or that they acquired from Potter complainant's secret formulae; deny all fraud, all unfair competition, that they have acted contrary to any trust imposed on Potter by his contract with complainant, and aver that complainant has no right to make and sell the "Oxydonor" because that right has been vested by him in a corporation; and that the letters patent of said "Oxydonor" have been held void in a suit relating thereto by a Circuit Court of the United States.

The master to whom the cause was referred to report on the law and the facts reported that the contract between complainant and Potter was valid, that afterward the acts of the parties thereto amounted to a complete abandonment of it, but not to a technical rescission; that complainant had furnished Potter with money and property of the value of more than \$3,000, and that Potter failed to comply with the contract. The master concludes that a fiduciary relation be-

tween complainant and Potter is established; that Potter as soon as he got his equipment from complainant violated his contract with the latter and betrayed complainant's confidence; that he manufactured and sold an imitation of complainant's goods calculated to deceive the public, using complainant's trade-marks and testimonials; that Potter received all the contract called for, was the first to violate it and cannot rescind without refunding. The master concludes that Potter in using means furnished by complainant for his own private benefit and violating the terms of the contract violated the trust thereby created; and that subsequently defendants had full knowledge of the fiduciary relation between complainant and Potter and took all Potter's rights in the contract charged with the trust therein raised; that the equities are with complainant and the prayer of the bill should be granted.

A decree was entered declaring plaintiffs in error trustees for complainant liable to account to him as such and restraining them from manufacturing, selling, advertising or dealing in the "Oxygenor," "Improved Oxygenor" and "Perfected Oxygenor King" or other clinical instruments resembling those devised by complainant. The master is directed to take and state an account and to ascertain and report defendants' profits and the damages sustained by complainant through defendants' unlawful acts. Subsequently upon the defendants giving bond in the sum of \$3,000 the injunction was granted and other proceedings were stayed.

FRANK P. BLAIR and L. A. GILMORE, for plaintiffs in error.

E. J. HILL, for defendant in error.

MR. JUSTICE FREEMAN delivered the opinion of the court.

Plaintiffs in error first insist that the contract with Potter of March 15, 1895, created no trust between the parties and hence none between complainant and defendants. By the contract Potter was granted the right to establish an office in Chicago for the exclusive sale of complainant's instru-

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ments in certain parts of Illinois. He was to be furnished with goods at a discount of 60 per cent. from the retail price and was to make settlements of account with complainant every thirty days, failing which the agreement was to be invalidated. Complainant agreed to advance funds to equip the Chicago office and to allow Potter a drawing account of \$35 per week for four weeks. Complainant's advances were to be repaid within one year with interest at six per cent. Potter was to establish other offices later as business might justify, and was to be furnished with a list of dealers in the state and to be allowed to sell anywhere at retail.

It is clear this contract did not make Potter complainant's trustee, except in a general sense. It was an agreement by complainant to advance Potter goods, office equipment and money to start in the business of selling complainant's instruments. The obligations imposed on Potter were to "diligently devote his time until otherwise agreed, to the interest of the business," to make settlements every thirty days for goods furnished by complainant, to pay within a year for the advances made, and to sell complainant's instruments only under the agreement while it lasted. No definite time was named for which the contract should continue. If Potter failed to meet these obligations and committed a breach of the contract, the law afforded a remedy. We discover nothing in the writing, however, which of itself made him thereafter trustee for complainant. He could be held responsible for any wrongful breach of the contract on his part, and for failure to meet his contract obligations; but we know of no ground upon which he could be regarded as a trustee for complainant under the contract. If he is to be regarded as such trustee in any sense it must be upon grounds independent of the contract.

The bill alleges, however, not only a breach of contract on the part of Potter but also a fraudulent imitation by defendants of complainant's invention. It is averred that using the means furnished by complainant, Potter incorporated the "Cardinal Curative Company" with defendant Mahler as general agent for the manufacture and sale of the so-called

"Oxygenor," a very close imitation not only in name but in fact of complainant's instrument called "Oxydonor;" and that this was held out as the latest and best of complainant's genuine productions. It is averred that with this fraudulent imitation first Potter and then defendants have sought and still seek to supplant complainant's instrument and obtain the trade built up by the use and sale of the original device. There is evidence which tends to support these averments. It appears that defendant Mahler in connection with the other defendants formed a copartnership and bought out Potter and the Curative Company and have since conducted the business in competition with complainant's device. There is evidence tending to show that Potter while employed by complainant on a salary obtained the knowledge or secret of the manner in which complainant's device was made and that he imitated it in the manufacture of the "Oxygenor;" that defendant Mahler obtained the knowledge from Potter and that he with the other defendants have used it in like manner. In *Peabody v. Norfolk*, 98 Mass. 452-456, it is said quoting from Lord Cranworth in *Morison v. Moat*, 9 Hare, 241: "There is no doubt whatever, that when a party who has a secret in trade employs persons under a contract express or implied, or under duty express or implied, those persons cannot gain the knowledge of the secret and then set it up against their employer." In that case an employee who had learned the secret and a third party who had made an arrangement to use the secret in conjunction with the employee were restrained from carrying out such arrangements. Potter no doubt by his arrangement with complainant was placed in a relation which enabled him to acquire the knowledge which it appears he made use of for his own benefit and in antagonism to defendant in error. Equity will prohibit one who occupies any position out of which duty to the person with whose interest he has been associated ought in equity and good conscience to arise, from acquiring such antagonistic rights. *Davis v. Hamlin*, 108 Ill. 39-49; *Trice v. Comstock*, 121 Fed. Rep. 620. And what he cannot acquire he cannot convey to others.

It is said the bill is not predicated upon the allegations relating to "unfair competition, infringement of trade-mark and fraudulent use of confidential information by Potter," but solely upon an alleged trust created by the contract referred to. The bill is open to that criticism, but it does contain allegations of that character which are amply supported by the evidence. The prayer of the bill is that the rights and interests the defendants acquired in the "Oxygenor" "be declared to have been acquired and to be held in trust" for complainant "under and by virtue of the said agreement of date March 15, 1895." We do not regard defendant in error entitled to the relief prayed for under and by virtue of that agreement, but upon other grounds stated in the bill. Equity looks to the substance rather than the form, and we are inclined to hold that the specific portion of the prayer for relief relating to the contract of March 15 may be treated as surplusage.

Whether Potter committed the first breach of the contract or not, is not in the view we take material, but so far as it may be so deemed, the finding of the master upon the contested question of fact where we cannot say that such finding is manifestly against the evidence, may be deemed conclusive. *Siegel v. Andrews*, 181 Ill. 350-356.

Plaintiffs in error urge laches in bringing the suit, that complainant waited seven years after breach of the contract of March 15, 1895, and offers no excuse therefor. Such defense is not available to defendants, who are continuing the wrong, as against future infringement. Equity will not extend the limitation of the statute where the latter would bar an action at law. (R. S. chap. 83, sec. 15.) *Castner v. Walrod*, 83 Ill. 171-175. Complainant claims to have been ignorant of what Potter and defendants were doing until recently. If that be true "no lapse of time, no delay in bringing a suit however long, will defeat the remedy, provided the injured party was during all this interval ignorant of the fraud." *Pomeroy's Eq. vol. 2, sec. 917*. Whether such ignorance existed or not as a matter of fact the master does not find nor the decree determine. If upon further investi-

gation it shall appear that complainant was ignorant of the fraud practiced and not guilty of laches, then he may be entitled to an account of gains and profits, otherwise not. *McLean v. Fleming*, 96 U. S. 245-257-8. The court there says: "Cases frequently arise where a court of equity will refuse the prayer of the complainant for an account of gains and profits on the ground of delay in asserting his rights even when the facts proved render it proper to grant an injunction to prevent future infringement."

While, therefore, the decree as entered is erroneous, complainant is nevertheless entitled to relief under the averments of the bill and the proofs. He is entitled to an injunction restraining further infringement and it may be to further relief as the proofs may disclose. The decree will therefore be reversed and the cause remanded with directions to the Circuit Court to allow complainant to amend his bill, and for further proceedings not inconsistent with the views above expressed.

Reversed and remanded with directions.

James Black v. William L. Exley.

Gen. No. 11,614.

1. **REGULAR TRIAL CALENDAR**—*when cause not properly on.* Where a cause has been placed upon the short cause calendar, it cannot again properly appear on the regular trial calendar until placed there by order based upon notice to the opposite party, or his counsel; and this is true notwithstanding the cause has been stricken from the short cause calendar "without prejudice."

BAKER, P. J., dissenting.

Action of replevin. Error to the County Court of Cook County; the Hon. WILLIAM H. HINEBAUGH, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1904. Affirmed. Opinion filed April 5, 1905. Rehearing denied June 23, 1905.

Statement by the Court. Defendant in error originally brought an action in replevin against plaintiff in error be-

fore a justice of the peace and obtained judgment from which an appeal was prosecuted to the County Clerk. In that court the case was placed on the short cause calendar pursuant to the provisions of the statute (R. S. chap. 110, Practice Act). It was not reached for trial on that calendar and about a month after it had been placed thereon it was, on motion of the plaintiff in the suit, stricken off the short cause calendar "without prejudice." This order was entered without notice to the defendant or his attorney, neither of whom was present or represented in court. A week later the cause appeared on the trial call of "the regular trial calendar," in the order in which it would have stood if it had never been placed on the short cause calendar. Thereupon the defendant's attorney appeared and moved to strike the cause from the regular trial call on the ground that having been placed on the "short cause calendar" and thereby stricken off "the regular trial calendar" as the statute provides, and not having been thereafter restored thereto in the manner required by statute, the case was not properly on that regular calendar for trial.

The provision of the statute (Section 5 of the Short Cause Calendar Act) is as follows: "If a suit which is upon the regular trial calendar shall be placed upon the 'short cause calendar,' it shall be stricken off the regular trial calendar, and shall not again be placed thereon; except upon notice to the defendant, his agent or attorney."

The court took the motion to strike the case from the trial call under advisement after hearing the defendant's objections. At the afternoon session of court the plaintiff's attorney was allowed over defendant's objection to file affidavits in opposition to defendant's motion. These affidavits have no special relevance to the question now presented. The court after hearing overruled the defendant's motion to strike the cause from the trial call, and it was afterwards called for trial in its order when reached upon "the regular trial calendar." Defendant's attorney then objected to the trial of the case on the same ground, viz., that it was still on the "short cause calendar." The objection was overruled and

defendant's attorney preserved his exception. He thereupon declined to participate in the trial on the ground that the court had no jurisdiction to try the case at that time. The plaintiff's attorney called his witnesses and the trial proceeded to verdict. It appears that the defendant was present with his attorney during the trial, and after return of the verdict entered orally a motion for a new trial, and subsequently filed points in writing in support of said motion.

ROBERT E. PENDARVIS, for plaintiff in error.

CLARK & CLARK, for defendant in error.

MR. JUSTICE FREEMAN delivered the opinion of the court.

When a cause has once been placed upon the "short cause calendar" in the manner provided in the statute (R. S. chap. 110, sec. 95-99), it becomes the duty of the clerk to strike it off the "regular trial calendar." *Brady v. Washington Ins. Co.*, 82 Ill. App. 380-382. In contemplation of law the case is no longer on the regular trial calendar, and must be treated accordingly. There is thereafter no way to get it back upon that calendar if it be not passed or continued, "except upon notice to the defendant, his agent or attorney." The case at bar was improperly stricken off the short cause calendar without such notice and in violation of the statute. In contemplation of law it still remained on said short cause calendar notwithstanding the order striking it off. The attorney for the plaintiff in the trial court suggests that the record does not show the case ever to have been upon the short cause calendar. It does, however, show a notice to place it on that calendar and an order striking it off. When, therefore, the cause appeared on the trial call of the regular trial calendar it was improperly there. The defendant's attorney appeared and moved to strike it off. Both parties were then present in court, with full notice, and upon hearing and consideration, the court refused to strike the cause off the regular trial calendar. This was equivalent to restoring it to that calendar with notice to the defendant. Before that time the cause had been on that calendar by default of the clerk.

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Brady v. Washington Ins. Co., *supra*, p. 383. Thereafter it was there by act of the court. The statute does not provide for any special method of giving notice, nor does it fix any time. The court had power to place the cause again on the regular trial calendar or docket, both parties having notice and being present. Section 16 of the Practice Act provides that all causes shall be tried or otherwise disposed of in the order they are placed upon the docket. Having been replaced on the regular trial calendar or docket, the cause was subject to trial when reached in its order, and it was so tried over the objection of the defendant. The objection, however, was that the case was still on the short cause calendar. In this defendant's attorney was mistaken. It had been restored to the regular calendar by the court's previous action. Doubtless had there been a motion for continuance based on proper affidavits in compliance with the requirements of the Practice Act in that respect, the court would have granted the application. It appears that the defendant and his attorney were present during the trial, and refused to participate therein. This was the defendant's right, but in the absence of any showing or application for a continuance, no reason appears why the trial should not have proceeded as it did.

Finding no material error, therefore, the judgment of the County Court must be affirmed.

Affirmed.

MR. PRESIDING JUSTICE BAKER, dissenting.

**Metropolitan Life Insurance Company v. Clifford
Johnson.**

Gen. No. 11,768.

1. INSURANCE POLICY—*how proceeds of particular, to be disposed of.* When an insurance policy provides that the company may pay the proceeds thereof to any person appearing to the company to be equitably entitled to the same by reason of having incurred expenses on behalf of the insured, such proceeds go to the estate of the deceased where the company fails to dispose of the same as provided

in said policy; but where such company has caused an undertaker to bury the deceased, upon the faith of the provision of such policy, the proceeds thereof, to the extent of the funeral expenses of the insured, should be paid to such undertaker.

Action commenced before justice of the peace. Appeal from the Circuit Court of Cook County; the Hon. GEORGE W. BROWN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1904. Affirmed. Opinion filed June 2, 1905. Rehearing denied June 23, 1905. Opinion refiled June 23, 1905.

Statement by the Court. This suit was originally commenced before a justice of the peace to recover upon an insurance policy, which contained a provision as follows:

"In case of such prior death of the insured the company may pay the amount due under this policy to the beneficiary named above or to any relative by blood or connection by marriage of the insured, or to any other person appearing to said company to be equitably entitled to the same by reason of having incurred expense on behalf of the insured, or for his or her burial; and the production of a receipt signed by either of said persons shall be conclusive evidence that all claims under this policy have been satisfied."

The policy was issued December 30, 1901, to one Cora Price. The amount payable in the event of death after one year was \$138. The beneficiary named in the policy was a daughter of the insured who appears to have died before the death of the latter. The insured endeavored to assign the policy to one Bassett, but so far as appears the assignment was never endorsed on the instrument by the company as the policy by its terms required in order to make such change effective.

The suit was brought by appellee as administrator, but in the Circuit Court Clifford Johnson was substituted in lieu of Clifford Johnson, administrator, as plaintiff, and he recovered judgment for \$100.

Appellee is an undertaker, and testified that he knew the cashier of appellant, and that about the first of March, 1903, he had a conversation with the said cashier with reference to the burial of the insured, the cashier stating that Bassett, to

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whom the insured endeavored to transfer the policy, was on the way with the policy, that it was all right and appellee could go ahead with the burial; that shortly afterward Bassett came with the policy and the receipt book showing payments made thereon. Upon the strength of what appellant's cashier said, appellee obtained the body of the insured and buried her. He testified that the prevailing and reasonable price for the service at that time was \$100, and that he had buried many people who were insured in the appellant company, depending on getting his pay when the claim for benefits under the policy was passed on and allowed. It appears from the testimony of the said cashier of appellant that appellee "has buried hundreds of persons who were insured in the Metropolitan Life Insurance Company, I believe." He states that when the company was notified of a death the custom was to issue papers for completion of the proof, which would be sent to New York for approval. This would take two or three days and meantime the bodies were buried. He testifies that "the fact of the matter is that people would call at the office and generally bring an undertaker with them and ask me to advise the undertaker when the claim was approved by the company. People would want the undertaker to go ahead with the funeral." He denies that in this case he had any conversation with appellee about the claim, or about the burial of Cora Price or the policy in question.

HOYNE, O'CONNOR & HOYNE, for appellant.

No appearance for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

The policy in controversy seems to have been contested upon the alleged ground that the deceased was suffering from a disease of the kidneys when the policy was issued, and concealed the fact from appellant. There is no direct proof that such was the case and there is conflict in the opinions of the medical witness who testified in reference to that matter. The evidence as to the alleged assurance to appellee from appellant's cashier that the policy had been turned in, that

it was all right and to go ahead with the burial is also conflicting. The finding of the jury, there being conflict in the evidence, must be deemed conclusive in this instance in favor of appellee upon the controverted questions of fact.

It is contended in behalf of appellant that the provision of the policy to the effect that the company may pay the amount due thereon to any person appearing to said company to be equitably entitled to the same by reason of having incurred expense on behalf of the insured or for his or her burial, is permissive only and if the company fails to exercise such option, then all rights inure to the benefit of the estate of the deceased, and appellee has acquired no rights thereunder. See *Lewis v. Metropolitan Life Ins. Co.*, 178 Mass. 52-54.

We are of opinion, however, that if, as the jury seem to have found, appellant by its authorized officer promised to pay appellee the expense of the burial of the assured, such promise may be deemed an election on the part of the company to pay that expense to appellee as the person equitably entitled to be so paid by reason of having incurred the expense of burial, and that having led appellee to incur such expense on the faith of that promise, appellant must be deemed estopped from now denying that it exercised the option given it by the policy and agreed to make such payment.

The judgment must be affirmed.

Affirmed.

Per curiam. In a petition for rehearing appellant seems to suppose that we intend to hold that any cashier in any of appellant's branch offices is entitled to act for the company and exercise the option contained in the policy. This is a misapprehension. There is evidence that appellee had been in the habit of relying on statements made by the cashier referred to, under similar circumstances in previous cases, that he had acted upon the information so given him by said cashier and subsequently received the money, and that this had been the usual course of dealing. The question of fact must be regarded as settled by the verdict, and upon such

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state of facts appellant should, we think, be deemed estopped to deny the authority of the cashier in this particular instance.

**George S. McReynolds, executor, v. James E. Brown,
receiver.**

Gen. No. 11,846.

1. **CERTIFICATE OF JUDGE—when nullity.** A certificate by a trial judge upon a transcript made up by the clerk is a nullity, as no such certificate is known to the law of this state.

2. **CHANCERY RECORD—what part of.** Motions filed and orders made in a cause and entered of record are a part of the chancery record without incorporation in a certificate of evidence.

3. **DECREE—when entry of, erroneous.** It is erroneous to enter a decree in a chancery cause where one of the parties against whom it purports to be entered had previously died, nor can such a judgment be entered *nunc pro tunc* as of a date previous to the death of such party, unless the cause was at the time of his death in condition for judgment.

4. **RECEIVER—how fees and disbursements of, should be provided to be paid.** A receiver is not entitled to a decree in his own name for the amount of his fees and disbursements. His fees and the fees of his counsel, when allowed by the court, should be merely taxed as costs in the regular way.

Bill for receiver, etc. Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1904. Reversed and remanded. Opinion filed June 20, 1905.

Statement by the Court. This is an appeal from a decree entered in the case of Klink et al. v. Central Avenue Investment Ass'n et al. by the Superior Court of Cook County on March 10, 1904, against Fannie E. Shipman and eleven others, *nunc pro tunc*, as of April 22, 1903. At this last date Fannie E. Shipman was alive. She died April 23, 1903. Appellant George S. McReynolds was appointed executor of her will on June 26, 1903.

The bill in this case was filed by A. F. Klink as a member and stockholder against the Central Avenue Investment As-

sociation, an unincorporated and voluntary association of persons formed in 1892 for investing in real estate, subdividing and disposing of lots for mutual profit. The bill makes charges of mismanagement by the officers of the association of its business, failure of the officers to report, conspiracy between the officers and sales agent of the association to get control of its books and assets, failure to pay its indebtedness and taxes upon its properties, and that tax sales thereof have been made; and that its affairs are in a tangled and complicated condition so that a receiver of the association is necessary, through whom an accounting may be had and the affairs of the association may be wound up and determined, and prays for the appointment of a receiver and for an accounting, etc. James E. Brown was appointed receiver and qualified and acted as such.

On June 20, 1903, on a motion to fix the amount of the receiver's fees, Fannie E. Shipman being then deceased and her executor not yet appointed, the Superior Court entered an order fixing the receiver's fees at \$1,000 and the fees of the solicitor for the receiver at \$500, and providing that the same be taxed as costs in the case.

On March 10, 1904, an order was entered setting aside a judgment rendered in the cause on November 30, 1903, and finding that at the date of the death of Fannie E. Shipman the accrued costs in the case amounted to \$2,842.62, and entered a judgment against Fannie E. Shipman and eleven other complainants for that amount in favor of James E. Brown, receiver, and that the judgment be entered *nunc pro tunc* as of April 22, 1903. To reverse this judgment, appellant, as executor of the will of Fannie E. Shipman, deceased, prosecutes this appeal.

Theron Durham, for appellant.

C. Arch Williams, for appellee.

MR. JUSTICE SMITH delivered the opinion of the court.

A motion was made by James E. Brown, receiver, to strike the certificate of evidence from the record for the reason

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that no certificate of evidence was presented to the trial judge until fifty-six days after the expiration of the time specified in the original order for filing it; and second, that the order of July 11, 1904, entered *nunc pro tunc* as of May 15, 1904, extending the time of the original order to July 15, 1904, is void and a nullity. Third, that there being no certificate of evidence in the record and transcript which can be considered by the court, there is nothing to show that appellant is a party to the cause; and that the certificate of the trial judge appended to the transcript is not a part of the transcript and cannot be considered by the court.

The clerk of the Superior Court certifies that the record filed in this court is a true, perfect and complete transcript of the record except a certain plea filed in his office July 8, 1903, in the cause of Klink et al. v. Central Avenue Investment Association et al. To the transcript thus certified by the clerk is appended a certificate by the chancellor to the effect that the record certified to by the clerk of the court is all of the evidence heard or considered by the court upon the hearing in said cause and all the evidence upon which the decree of March 10, 1904, was entered, and then follows the usual form of a certificate of evidence.

An inspection of the transcript shows that it contains copies of the bill and amendments, answers, notices of motions, petitions, demurrers, reports of the receiver, affidavits of claims presented to the receiver, certificates of publication, exceptions to receiver's reports, pleas, appearances, orders, decrees and files in the cause. The transcript itself contains nothing that purports to be a certificate of evidence. We cannot look to the certificate of the judge appended to the record, for the law knows of no such proceeding or action of the judge. It has no legal significance or effect, being entirely outside of the record and without warrant of law and cannot be considered by this court for any purpose. As stated in *Flaherty v. McCormick et al.*, 123 Ill. 532: "All oral motions in a chancery cause should be, and are supposed to be, noted upon the clerk's docket and a minute thereof made by the judge himself, and the motions, together with

the orders made thereon, should be duly entered of record by the clerk in making up his orders in the case. By this means they become a matter of record without the aid of a judge's certificate, or bill of exceptions, as required in a case at law. So where a motion is reduced to writing and filed in the cause, it is then as much a part of the record as anything else in it, and the setting it forth in such a certificate would add nothing to its force or validity. Indeed, the certificate of a judge as to what the motions and orders were in a chancery case, is just as inoperative and as much out of place as a statement in a bill of exceptions of the pleadings and the rulings of the court in respect to them would be in an action at law. Under our practice, the only certificate we can now recall which a judge is required to make in a chancery cause is what is known as a 'certificate of evidence;' yet the certificate in the present case does not, in our opinion, perform the functions of such a certificate." * * * "The sole office or function of a certificate of evidence in chancery causes, as its very name implies, is truly to set forth the evidence offered, rejected, received and considered on the hearing, and any attempt to make it subserve some other purpose is without warrant of law."

The record does not contain a certificate of evidence. It contains only those things that should be duly entered of record by the clerk, and the files in the cause. The motion to strike must therefore be denied.

It appears from the record that James E. Brown, receiver, on May 16, 1903, filed his petition and a report in which is shown a list of bills payable incurred in the administration of the property in the hands of the receiver and that the enumerated bills comprise all the administration expenses within the knowledge of the receiver except the fees of the receiver and his solicitors. In Exhibit "D" attached to his petition is set forth an itemized statement of receipts amounting to \$854.21, and disbursements amounting to \$866.95. In the receipts as stated appears a loan on receiver's certificate of \$350. The administration expenses set out in the petition amount to \$1,342.62, and the petition prays that suit-

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able provision be made for the payment of the administration expenses and receiver's fees and the fees of his solicitors and that judgment be entered against the Association and its members therefor.

It will be observed that twenty-three days had elapsed after the death of Fannie E. Shipman when the receiver first presented to the court the facts stated in the petition and asked for the relief therein prayed. The court, on June 20, 1903, fixed the receiver's fees at \$1,000 and the solicitor's fees at \$500 and ordered that these amounts be taxed as costs in the case, reserving the question of liability therefor, and on November 30, 1903, entered a judgment against Fannie E. Shipman and others for \$2,842.62 for the above fees, expenses, etc.

On February 5, 1904, appellant having been appointed and having qualified as executor of the will of Fannie E. Shipman, presented his petition to the court suggesting the death of Fannie E. Shipman and prayed that the judgment of November 30, 1903, be vacated and set aside and that the execution issued thereon be quashed. Thereupon on the 10th day of March, 1904, the court entered the order and judgment appealed from, *nunc pro tunc* as of April 22, 1903.

It is clear that the judgment was erroneous. Waiving for the moment the propriety of entering common law judgments in chancery cases, the cause was not in such condition on April 22, 1903, that a final judgment could then have been entered. In Freeman on Judgments the author says (in section 59): "But in every case to entitle the applicant to have his judgment entered *nunc pro tunc* on account of the death of one of the parties, the action must at the time of such death have been ready for the rendition of the final judgment."

In Black on Judgments, vol. 1, section 133, the author says: "The rule that a judgment may be entered *nunc pro tunc*, when such action is necessary in order to save a party from being unjustly prejudiced by a delay caused by the act of the court in course of legal procedure, must be taken with an important restriction, viz., that such an entry is not proper

unless the case was in such a condition, at the date to which the judgment is to relate back, that a final judgment could then have been entered immediately. * * * As it has been said, 'A judgment *nunc pro tunc* in case of death is proper only when a party dies after hearing, while the case is under advisement or after the case has proceeded so far that judgment can be entered, if not as a merely formal act, at least without the need of further inquiry or evidence into matters of fact involved in the controversy.'" Hazard v. Durant, 14 R. I., 25.

It is evident from the record that inasmuch as the receiver's petition and report, in which the claims were first presented to the court on which the judgment was entered, were not filed until May 16, 1903, and the evidence, if any was offered, as to fees of receiver and solicitor, was not heard by the court until June 20, 1903, the basis for the judgment did not exist on April 22, 1903, in any of the pleadings of the parties or in any action of the court. No judgment, therefore, could have been pronounced on that day.

The judgment is erroneous upon another ground. A receiver is not entitled to a judgment in his own name, as receiver, for costs in an equity case in which he is appointed and is acting as receiver. He is not a party to the cause by reason of his appointment as receiver, and is not entitled to any decree or judgment therein. His fees and expenses and the fees of his solicitor, when allowed by the court, should be taxed as a part of the costs in the case in the regular way.

Incorporating formal common law judgments in orders and decrees in equity, as was done in this case, is a practice not to be commended. It may not be erroneous, but it is certainly informal and irregular.

For the reasons given the motion to strike is denied and the decree and judgment of March 10, 1904, is reversed and the cause is remanded.

Reversed and remanded.

American Brake Shoe & F. Co. v. Jankus.

American Brake Shoe and Foundry Company, a corporation, v. Charley Jankus.**Gen. No. 11,866.**

1. **INTERPRETER**—*when discretion of court in selecting, will not be reversed.* The action of the court in selecting a particular interpreter will not be held as ground for reversal unless injury appears to have resulted.

2. **PERSONAL INJURIES**—*right of juror to examine.* Where a party is permitted to exhibit his injuries to the jury, it is not error to allow a juror to take hold of the plaintiff's arm and move it up and down to ascertain for himself the extent and nature of the injury complained of.

3. **SUDDEN DANGER**—*duty of servant when confronted with.* A servant suddenly confronted with danger is not required to act with the same deliberation and foresight which might be required of him under ordinary circumstances, where he would have time for deliberation.

4. **SERVANT**—*when does not assume risk arising from defect known to him.* Notwithstanding a servant knew of the defect which caused his injury, if the master ordered him to proceed with the dangerous work, he does not assume the risk of so doing unless the danger was so imminent that a person of ordinary prudence and caution would not have incurred it.

Action on the case for personal injuries. Appeal from the City Court of Chicago Heights; the Hon. HOMER ABBOTT, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1904. Affirmed. Opinion filed June 20, 1905.

Statement by the Court. This action was brought by appellee against appellant to recover damages for a personal injury sustained by appellee while in the employ of appellant at its factory in Chicago Heights, Cook county, Illinois, on or about April 17, 1903.

Appellee had been in the employ of appellant about two years at the time of the accident. He was employed by appellant to operate a machine known as a "rattler" or "dum box" which was used in cleaning castings. The construction of this machine and its operation is shown by a cut offered in evidence. The rattle box proper consists of the end pieces commonly called "rattler heads," and the pieces of cast iron

connecting these end pieces corresponding to the staves of a barrel and called "rattler staves." These staves weigh from 365 to 375 pounds each, and are fastened to the end pieces or "rattler heads" by three-quarter inch bolts passing through the rim of the "rattler heads," and through slots in the end of the staves. Upon the upper ends of the bolts are threads by means of which nuts are screwed down upon the staves. Between each nut and stave is placed a washer three inches in diameter. There are two slots in each end of each stave, and each stave is fastened to the rattler head by means of two bolts at each end. Two of these staves are called "covers," because they are arranged so that they can be readily removed from the rattle box. The bolts used in fastening these two covers work on a swivel, so that upon loosening the nuts the bolts will drop back out of the end slots, thus allowing the covers to be removed. The rattle box proper is six feet long and thirty-seven inches in diameter and is cylindrical. It is turned at the rate of twenty-three revolutions a minute by a shaft, connected with gear-wheels which are in turn connected with the main or power shaft by belt and pulleys, one of the pulleys being a "tight pulley" and the other a "loose pulley" turning upon the shaft without turning the shaft. The belt is switched from one pulley to the other by means of pushing a rod.

In the operation of the machine the covers are removed and castings are placed in the rattle box through the openings made by the removal of the covers. The covers are then replaced and the rattle box made to turn by shifting the belt to the "tight pulley," and thereby the castings in the rattler are thrown against each other and the sides of the rattler and thus cleaned.

Plaintiff's declaration consists of three counts. The first count avers in substance that the defendant (appellant) failed and neglected to furnish one of the covers of the rattler with good, safe and secure fastenings, and that by reason thereof said cover was by the force of its rapid revolutions thrown with great violence against the plaintiff, and he was thereby knocked against and into other moving machinery

and injured, and that plaintiff did not know that said fastenings were defective, insecure and insufficient to hold the covering on said box while in motion.

The second count, in addition to the averments of the first count, alleges that the plaintiff was subject to the instructions and orders of a boss or superintendent with authority to employ and discharge men, and that the plaintiff was not skilled in the construction and operation of machinery and had no knowledge as to the required strength of any piece of machinery to perform its work, and did not know whether or not the said fastenings were safe and sufficient to bind and hold said cover to said box while in motion, and that upon making inquiry of his boss in regard thereto was informed by him that said fastenings were good, safe and sufficient and that there was no danger in working near said box while in motion and that his said boss ordered him to work near and about said box while the same was running at a high rate of speed.

The third count avers that the defendant furnished an unsafe, insecure and defective cover for the opening into said box, to wit, a cover with one of the corners broken off so that it could not be fastened and held safely and securely on the box while it was in motion, and in consequence thereof the covering of the box became loose and detached, so that the castings which were inside of the box came out through the opening and struck plaintiff and he was knocked against and into other moving machinery and injured, and repeats the averments of the second count as to the plaintiff's want of skill and knowledge regarding machinery. It also avers that while the plaintiff knew that one corner of the cover was broken off, and complained about the same, he did not know what effect such defect would have upon its safety and sufficiency, and that upon making inquiry of his boss in regard thereto he was informed that said covering was good, safe and sufficient, and that there was no danger in working near the box while in motion.

The evidence on the part of the plaintiff tended to show that on the morning of April 17, 1903, when plaintiff com-

menced operating the rattler, he discovered that one corner was broken off the cover to the rattler and thereupon he called the attention of the foreman to the condition of the cover and the bolt and told him that the screw or thread in the bolt was not good, was broken, and one corner was broken off the cover; that the foreman or boss said to him: "It is all right, go ahead." The plaintiff thereupon shoved the belt over and started the rattler, and proceeded with his work of oiling other machines. The plaintiff then observed that a brake shoe was sticking out from the rattler in question between the cover and the box, and sprang to shut off the power and stop the rattler. As he was doing this he was hit in the back by a casting from the rattler and fell against other moving machinery, receiving the injuries complained of.

On the trial in the court below the jury returned a verdict finding the defendant guilty and assessing the plaintiff's damages at \$775. Judgment was entered on this verdict and defendant prosecutes this appeal.

HORTON & BROWN, for appellant.

GEORGE A. BRINKMAN and PAUL P. HARRIS, for appellee.

MR. JUSTICE SMITH delivered the opinion of the court.

It is urged by appellant as a ground of reversal that the trial court erred in permitting Leon Waikewicz to act as an interpreter in the trial of the case.

It appeared from the testimony of Waikewicz touching his competency to act as an interpreter that the plaintiff was living in Waikewicz' house; that he had talked with the plaintiff about this law suit and that he had loaned plaintiff \$11, which was unpaid, and that he had acted as interpreter between the plaintiff and his attorney all through the preparation of the case for trial. It further appears from the record that Waikewicz was a poor interpreter, having very little knowledge of the English language. It does not appear, however, that he acted unfairly in any particular or that appellant suffered in any way from any bias in favor

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of appellee in his interpretation of the testimony of the witnesses. Attorneys for appellant do not point out to the court any instance of unfair conduct on his part during the trial, and we must conclude that appellant suffered no particular injury from erroneous or inaccurate interpretations of the testimony. We think it must be shown that some injustice has been done by the selection of an interpreter before we would be justified in interfering with the discretion of the trial judge in the selection of an interpreter. We find in this record no abuse of discretion in the selection made.

On the trial the plaintiff was allowed to exhibit his injuries to the jury. Having removed for that purpose his coat, vest and shirt and a part of his undershirt, the plaintiff left the witness stand and while he was standing before the jury he was asked by his attorney to lift up his arm and show it. The plaintiff replied: "I cannot lift it up any more; the arm is sore." Thereupon one of the jurors arose from his seat and stepping forward took hold of plaintiff's arm and moved it slowly up and down, and bent it at the elbow, and felt of it between the elbow and shoulder. To all of this the defendant objected and excepted and now assigns it for error. The point is made that to permit one of the jurors to take hold of, move, and bend the arm of the plaintiff in order to ascertain for himself whether or not the arm was stiff or otherwise permanently injured is quite a different matter from permitting all of the jurors to view the injuries together. Counsel for appellant cite in support of their contention *Stampofski v. Steffens*, 79 Ill., 303; *Doud v. Guthrie*, 13 Ill. App., 653, and *Consolidated Ice M. Co. v. Trenton Hygeian Ice Co.*, 57 Fed. Rep., 898. All these cases, however, pass upon personal examinations or inspections made by jurors out of court during recesses of the court, and not in the presence of the court, or an officer of the court. There are many obvious reasons for not allowing jurors to supplement the knowledge of the subject-matter of investigation obtained in court from the evidence produced, by pursuing personal and private investigation out of the presence of the court, during the trial. It is impossible for the court or coun-

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sel to know just how far the juror has gone with his inquiry, or by what means he has pursued it, or to make a record of it, without turning aside from the regular trial of the cause and investigating the acts of the juror and the results thereof. This would not only be irregular, but it would necessarily result in permitting the inquiry by jurors to go beyond the control of the court and beyond the established rules of evidence, and into irrelevant and immaterial matters. As said in *Clark v. Brooklyn Heights R. R. Co.*, 177 N. Y. Appeals, 359: "The object of all evidence is to inform the trial tribunal of the material facts which are relevant as bearing upon the issue, in order that the truth may be elicited and that a just determination of the controversy may be reached. It is not objectionable, in these cases, that the evidence may go beyond the oral narrative and may be addressed to the senses; provided that it be kept within reasonable limits by the exercise of a fair judicial discretion. It should be only of a nature to assist the jurors to an understanding of a situation, or of an act, or to comprehend objective symptoms resulting from an injury. Examples of this class of evidence are frequent; in the viewing of the place of an occurrence, in the production of some article relevant to the issue, or in the exhibition of the person and of the marks, or obvious evidences of injuries sustained. Personal injuries may be simulated and deception may be practiced in such exhibitions, but that can no more be prevented than can perjury in testimony." In the above case the plaintiff was seeking to recover damages for personal injuries sustained in a collision, and the court permitted him to leave the witness stand, at the request of his counsel, to exhibit himself to the jury in the act of writing his name, and of taking a drink of water. The record represents him as taking a glass of water with both hands and as spilling the water, through the trembling of his hands, and as using his handkerchief in the same manner. This exhibition was to illustrate or to emphasize his testimony that he could use his hands with difficulty. The court thought that this spectacular illustration of his symptoms was calculated to prejudice the minds of the jurors.

The proceedings in that case, however, were very different from the matters here complained of. We do not think it was reversible error to allow the juror to take hold of the plaintiff's arm and move it as indicated.

We think the evidence tends to show that the injury to the plaintiff complained of was caused by the defects described in the declaration. The fact that the corner was broken off some months prior to the accident and that the rattler had been used during that time without accident, does not necessarily disprove the theory of the plaintiff's case. There is ample evidence in the record to support the verdict of the jury.

Appellant contends that the court erred in giving the fifth instruction asked by the plaintiff. That instruction is as follows:

"The court instructs the jury that if the evidence shows, and you believe from the evidence, that the plaintiff, while in the discharge of his duty, was confronted with sudden danger, the obligation resting upon him to exercise due care for his own safety, does not require him to act with the same deliberation and foresight which might be required of him under ordinary circumstances."

It is urged that there was no evidence upon which the instruction can be based.

It appears in the evidence that one corner of the cover was broken and that a bolt used to fasten on the cover was so worn or defective as to cause the plaintiff and his fellow-servants to be apprehensive as to the safety of the rattler. Plaintiff after calling the attention of his foreman to the condition of these parts was directed to start up the machine. When he saw the dust and castings escaping from the rattler he was confronted suddenly with danger. Under such circumstances to have run away would have been a wiser course for him to take, and yet to an ordinarily loyal employe the proper and natural act would seem to be to stop the rattler and thereby save the property of his employer and pro-

mote the safety of his fellow-servants. Indeed it was the duty of appellee to try to save the property and to seek to prevent the injury that might result if the rattler was allowed to run in its then condition. *Pullman Palace Car Co. v. Laack*, 41 Ill. App., 37. He was confronted suddenly with danger and a duty arose in view of that danger. The law under such circumstances does not require the servant to act with the same deliberation and foresight which might be required of him under ordinary circumstances, where he would have time for deliberation. We think the instruction was proper under the evidence.

The eighth instruction asked by plaintiff and given by the court is as follows:

"No. 8. The court instructs you on the law in this case, that where an act is performed by a servant, in obedience to a command from one having authority to give it, and the performance of the act is attended with a degree of danger, yet, in such case it is not requisite that such servant shall balance the degree of danger, if any, and decide with absolute certainty whether he must do the act or refrain from doing it; and his knowledge of attendant danger will not defeat his right of recovery if in obeying the command he acted with the degree of prudence that an ordinarily prudent man would have done under the circumstances, provided these facts are warranted by the evidence."

It is urged that the plaintiff was instructed to start the machine in motion, not to stop it, and that the instruction had no basis in the evidence. The evidence, however, shows that it was a part of plaintiff's duty to stop the rattler whenever proper or necessary. We do not perceive that the giving of this instruction prejudiced appellant in any way.

Appellant contends as a ground of reversal that appellee assumed the risks, if there were any, arising from the defects in the machine alleged in the declaration. The rule that when a servant seeks to recover from his master for an injury received from defective appliance, he must show not only that the appliance was defective and that the master

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had knowledge thereof, or ought to have had, but that he, the servant, did not know of the defect, and had not equal means of knowing with the master, is appealed to in support of this contention. But "it is well settled that even though the plaintiff knew of the defect, if the master ordered him to proceed with the dangerous work he did not assume the risk of so doing, unless the danger was so manifest that a person of ordinary prudence and caution would not have incurred it. Even if the servant has some knowledge of attendant danger his right of recovery will not be defeated if, in obeying the order, he acts with the degree of prudence which an ordinarily prudent man would exercise under the circumstances." *Gundlach v. Schott*, 192 Ill., 512; *Wells v. Bourdages*, 193 Ill., 328. The evidence shows that appellee went for and brought the foreman from another part of appellant's factory to the rattle box, and pointed out to the foreman the condition of the cover and the bolt for holding it in place, and after inspecting it the foreman ordered him to go ahead and perform his work. Under such circumstances the plaintiff had a right to assume that the foreman with his superior knowledge of the facts would not expose him to unnecessary perils. Such an order gave the plaintiff the right to rest upon the assurance that there was no danger, for that was implied by the order.

We find no reversible error in the record. The judgment of the court below is affirmed.

Affirmed.

B. Shoninger Company v. Edward Mann, by next friend.

Gen. No. 11,875.

1. **ELEVATOR SHAFT**—*obligation of owner of building to guard.* It is the duty of the owner of a building properly to guard and protect the elevator shaft therein, and if such owner fails to discharge that duty and an injury is sustained by the tenants or employes of the tenants, or other persons rightfully upon the premises, from such failure of duty, the owner is liable therefor, and this notwithstanding contract arrangements existing with third parties.

2. CONTRIBUTORY NEGLIGENCE—*how question of, determined.* The question of contributory negligence is to be determined by the jury as a question of fact, where the evidence is conflicting or is susceptible of different interpretations.

3. AMENDMENT—*when, permitted on trial not ground of complaint.* Where the amendment permitted on the trial and claimed as a surprise, did not add anything to the declaration, no ground of complaint can be urged.

4. VERDICT—*when not excessive.* A verdict of \$10,000 is not excessive where the plaintiff, a boy of the age of about 16 years, received injuries which destroyed his future and rendered him a helpless invalid for the remainder of his life.

Action on the case for personal injuries. Appeal from the Superior Court of Cook County; the Hon. JOHN L. HEALY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1904. Affirmed. Opinion filed June 20, 1905.

Statement by the Court. This is an action on the case commenced by Edward Mann, a minor sixteen years old, by Alexander Mann, his next friend, against B. Shoninger Company for injuries sustained by the plaintiff, appellee, by falling into an elevator shaft at 267 Wabash avenue, Chicago, on the 10th day of December, 1901. The declaration consists of two counts. The first count avers that the plaintiff was a minor sixteen years old and a servant of Thompson & Thomas. He was engaged near the elevator shaft of the defendant's premises in the performance of his duties; that the defendant carelessly and negligently left the elevator shaft on the first or ground floor of said building unguarded and unprotected, and that the plaintiff, while in the exercise of ordinary care for his own safety, fell into said shaft and was injured. The second count avers the same facts and in addition thereto that the elevator shaft was provided with a wooden door which when pulled down closed the shaft, and that the defendant carelessly and negligently failed to push said door down so as to cover said shaft and moved said elevator away from said floor carelessly and negligently without notice or warning to the plaintiff and carelessly and negligently left said shaft open and unprotected.

The evidence shows that defendant, appellant, was, on the

10th day of December, 1901, occupying said premises and operating said elevator under a lease from Lewis S. Perry, as trustee, and in his own right; that appellant had sub-let various portions of the building to different tenants, and that at the time of the accident in question The Thompson Music Company occupied the south half of store and basement of the building, Kurz & Allison occupied the third floor; that Thompson & Thomas occupied the second and fourth floors of the building. The building faces east on Wabash avenue and along the west or rear end of the building runs north and south an alley. The elevator shaft was at the rear end of the building about six feet from the alley, and there was a passage from the alley to the elevator about six feet long. The elevator ran from the basement to the fourth floor of the building. The elevator and the entrance leading thereto was not demised to any of the tenants. It remained under the control of defendant for the benefit of the tenants of the building by whom it was used. The lease of appellant to Thompson & Thomas provided, "that the party of the second part shall have the use of the freight elevator in common with other tenants in the building in which the demised premises form a part." Thompson & Thomas took possession of their part of the building on May 1, 1900, and continued in possession until May 1, 1902. No regular man was in charge of the elevator prior to May 15, 1901. On that date, appellant took exclusive possession of the elevator, the steam heating plant and the passageways and halls. After that date, the tenants of appellant had nothing to do with the management of the building, the steam heating plant or the operation of the elevator.

Appellee had worked for Thompson & Thomas two or three weeks at the time of the accident. He had made two trips on the elevator before the accident, one about a week before he commenced working for Thompson & Thomas, and the other a few days before the accident. He was employed as an errand boy to assist in handling and delivering packages of books. Appellee and some other boys working for the same firm were instructed just before the accident to

take some packages of books to the entry way to the elevator and there to deliver them to various express companies. They placed the packages of books on the elevator and descended on the elevator with the packages of books to the main floor, and the books were taken off the elevator and placed in the entry way. When the Wells Fargo Express Co. man called, appellee started to look for one of the packages. It was about 5:30 P. M. and at that hour on December 10, 1901, it was dark. No light was maintained in the entry way. The boys had with them an ordinary barn lantern with a reflector on the back of it, and bull's-eye in the front. At the time appellee fell this lantern was held by another boy who was looking for packages on the other side of the entry way, and appellee was facing south, but moving toward the east, looking for a package. Palmer, who was in charge of the elevator for appellant, had taken the elevator up after the packages had been placed in the entry, leaving the elevator shaft unprotected, but appellee had not noticed this movement of the elevator and supposed it was still there. Appellee's foot accidentally slipped and he fell towards and into the shaft, receiving the serious injuries complained of. There was a wooden door to the elevator shaft, but at the time of the accident, and for many months prior thereto, the door did not work and the shaft had been left unguarded and unprotected in any way.

The results of the fall were that the entire nervous system of the plaintiff was seriously injured and the plaintiff is suffering from constipation, diabetes and blood in the urine, and total blindness of the left eye. These conditions are incurable and permanent and the plaintiff cannot live many years. Before the accident he was strong and healthy and had never been sick.

The jury returned a verdict in favor of the plaintiff for \$10,000. The court overruled a motion for a new trial and entered judgment on the verdict.

ROSENTHAL, KURZ & HIRSCHL, for appellant.

ARNOLD HEAP and DAVID K. TONE, for appellee.

MR. JUSTICE SMITH delivered the opinion of the court.

No question is made here as to the manner or the fact of the injury received by the plaintiff, nor is there any controversy as to the extent of the injury. It is contended, however, that under the pleadings and the evidence there should have been no recovery against the defendant.

It is not strongly insisted by counsel for appellant that appellant was not guilty of negligence in permitting the elevator shaft to remain open and unguarded and the entry way dark and without any light. The state of the record is such, however, that appellant is here insisting that appellee was guilty of contributory negligence, while not much is said touching appellant's negligence. The evidence is undisputed that at the time of the accident, appellant was in possession of the entire building, subject, of course, to the rights of its tenants. Appellant was in full possession and control of the halls, entry ways, steam heating plant, and elevator, and was operating the elevator for the benefit of itself and its tenants. Under such circumstances it was undoubtedly the duty of appellant properly to guard and protect the elevator shaft, and if it failed to discharge that duty and any injury was sustained by the tenants or employees of the tenants, or other persons rightfully upon the premises, through such failure of duty, appellant is liable therefor. *Payne v. Irvin*, 144 Ill., 482; *The People's Bank, etc., v. Morgolofski*, 75 Md., 432; *Mauzy v. Kinzel*, 19 Ill. App., 571; *Fisher v. Cook*, 23 Ill. App., 621. This duty was not in the least affected by its contracts with persons other than appellee, such as the provision in the lease between appellant and Thompson & Thomas, appellee's employers, to which appellee was not a party. *Springer v. Ford*, 189 Ill., 430. No question is made by the evidence that this duty was performed. It is admitted that the entry way was dark and unlighted by appellant, and that the elevator shaft was left without any guard or protection. This in our opinion was gross negligence. Unless, therefore, appellee was guilty of contributory negligence, appellant is liable for appellee's injuries. This question will now be considered.

Whether the plaintiff was exercising ordinary care at the time of the accident should be considered with reference to what he was doing and the conditions in which he was placed. The evidence showed that he was engaged actively in the discharge of his duties; that the place was dark, too dark to read writing readily, even with a lantern. The entry was unlighted in any way by appellant. Plaintiff and the boys working with him had one lantern. This was in the hands of one of the other boys. At the time of the accident the light was turned toward the alley and it was dark in and about the shaft. Plaintiff was sixteen years of age. While thus engaged and under these conditions plaintiff slipped and fell toward and into the elevator shaft.

As stated by appellant's counsel in their brief, there is no conflict in the evidence. The question then is, under this evidence, was the plaintiff guilty of negligence *per se* so that the court can pronounce it such as a legal conclusion and not as a mere deduction from the evidence? That is in substance the contention of appellant. But whether he was negligent or not was a question of fact for the jury, we think, under the facts here shown; and we do not think there is such clear and undisputable negligence shown, contributing to the injury as would have justified the court below in holding that contributory negligence was proved, and in instructing the jury on that basis and consequently the question was properly left to the jury to determine as a question of fact. *Ames & Frost Co. v. Strachurski*, 145 Ill., 192; *Rosenbaum v. Shoffner*, 98 Tenn., 624; *Village of Cullom v. Justice*, 161 Ill., 372; *Mauzy v. Kinzel*, 19 Ill. App., 573.

The question of negligence, both on the part of the plaintiff and defendant, was for the jury to determine from all the evidence, and we are unable to say that their verdict is not fully supported by it.

The question of assumption of risk by the plaintiff is argued extensively by counsel for appellant. We do not regard that question as in the case for obvious reasons. Hence, we do not discuss it, or the cases cited growing out of the contractual relations of master and servant.

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Appellant claims that it was surprised by the amendment to the declaration made by leave of court during the trial, and that its application for a continuance should have been granted. During the trial there was inserted in the first count of the declaration after the word "eyes" near the end of the count the following words: "And thereby plaintiff's liver, kidneys, nervous system and brain were permanently injured."

In our opinion appellant was not prejudiced by the amendment for the reason that the declaration, as it stood before the amendment, permitted a recovery for every ailment proved on the trial. The amendment added nothing to the declaration. *L. S. & M. S. Ry. Co. v. Ward*, 135 Ill., 511; *Baltimore & O. S. W. R. R. Co. v. Slanker*, 180 Ill., 357.

Appellant urges that the damages awarded by the jury are excessive. With this contention we do not agree. The uncontradicted evidence in the record shows that the injuries suffered by the plaintiff are of the most serious character, and that they are permanent. His entire future is destroyed. He can never be of any use to himself or any other person. As a result of the accident he is and must remain an invalid all his life. We cannot say that the verdict is excessive.

Finding no error in the record the judgment is affirmed.

Affirmed.

Henry H. Helmick v. Western Assurance Company.

Gen. No. 11,885.

1. **INSURANCE AGENT**—*when, not entitled to commission.* Where under an agreement for service, compensation was to be paid to an agent in the event of his performing certain services therein specified, and such services were not rendered, the agent is entitled to no commission.

Action of assumpsit. Error to the Superior Court of Cook County; the Hon. AXEL CHYTRAUS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1904. *Affirmed.* Opinion filed June 20, 1905.

Statement by the Court. This action in assumpsit was brought by Henry H. Helmick, doing business as H. H. Helmick & Co. as an insurance broker, against the Western Assurance Company to recover commissions claimed to be due from the defendant for procuring the Chicago & Grand Trunk Railway Company, the Grand Trunk Junction Railway Company, the Detroit, Grand Haven & Milwaukee Railway Company and the Cincinnati, Saginaw & Mackinaw Railroad Company to place their insurance against fire for the year 1896 with the defendant. The plaintiff in his declaration and in his evidence claimed ten per centum of the amount of premium received by the defendant, which was \$16,800.

In the latter part of 1895 and in January, 1896, plaintiff was engaged in the business of fire insurance brokerage, and chiefly in placing insurance for railroad companies. The agreement upon which the action is based is contained in the correspondence between the parties between November 21, 1895, and January 11, 1896. After some preliminary correspondence, not material here, the plaintiff Helmick on November 30, 1895, wrote the defendant as follows:

"About December 10th we will offer you 5 different schedules for bids, but we see no way in which we can be protected unless we give you the names of all roads whose schedules we will present to you and you close the same to us against competition from this date. We would be pleased to hear from you at once in regard to this matter."

On December 2, 1895, Mr. Crandall, Superintendent of Agencies for defendant, replied to the above letter for the defendant, declining the suggestion or request of plaintiff and saying:

"We should not want to curtail our chances for this business in the way you suggest. We can simply say to you, as I said in Chicago, that upon receipt of schedules from you, if we have not already received them from other parties and be open, we will send you a bid and thereafter will not bid

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to any one else. If, however, upon receipt of your schedule it should happen that we have already bid, the schedules will be promptly returned to you with statement to that effect."

On December 3, 1895, plaintiff wrote to defendant as follows:

"During the next four months we will be pleased to present for your consideration the schedules of the following well-known roads, viz. (here follows the names of the roads). We desire to be considered the brokers on these various lines for your companies."

Mr. Crandall replied to this letter for the defendant on December 5, 1895, saying:

"Calling your attention to what we said in our last letter on this subject we beg to advise you further that as to some of these roads we have received and have not granted a like request made by other parties. We hold ourselves absolutely open on all these roads to whomsoever shall first present us with the schedules. If we shall first receive schedules from you we will quote you a figure and will not thereafter quote any figures to anyone else, but should we receive these schedules first from other parties we should feel equally bound in honor to name a figure to them and to return your schedules declining to quote to you."

On December 14, 1895, Helmick wired the defendant as follows: "We mail schedules as mentioned in our letter of December third. Please close to us." Helmick confirmed this telegram by two letters of the same date, giving a list of the roads. The schedules mailed by Helmick were those of 1895.

On December 16, 1895, Crandall on behalf of defendant wired plaintiff as follows: "We will bid to you only on schedules mailed Saturday." Thereupon on December 17, 1895, Crandall on behalf of the defendant sent to Helmick by letter a bid, based upon the schedules received from him, to be submitted to the railroad companies, for insurance covering all the properties described in the schedules, for the

year 1896, and returning the schedules. The premium named in the bid amounted to \$18,445. Helmick wrote Crandall on December 24, 1895, that 750 leased cars contained in the schedules had been returned to the owners; that they were valued at \$350 each and that this amount should be deducted from the insurance company's bid; and also inclosing schedules of the Northern Ohio Railway. Crandall on the 26th of December, 1895, wired, and confirmed it by letter, reducing Grand Trunk bid \$660 and increasing Lake Erie bid \$980.

Mr. Helmick testified that he received the revised schedules of 1896 about January 6 or 7, 1896. Mr. Crandall testified that the defendant received the revised schedules of the properties of the railroad companies to be insured for 1896 from Rathbone & Company of New York City on January 11, 1896, and that he did not know until that date that any other schedules than those which had been sent him by Helmick in December, 1895, had been issued by the railroad companies, and that immediately upon receiving the new schedules he telegraphed Helmick as follows: "We understand Chicago & Grand Trunk have issued revised schedule for ninety-six. Figures quoted will not apply to these." Helmick, upon the receipt of this telegram, did not send either of these revised schedules which he had in his possession from January 6 or 7, 1896, to the defendant, but he wrote the defendant on January 11, 1896, stating that he had requested Mr. Muir, an officer of the Grand Trunk Railroad, to forward the revised schedules to the defendant at Toronto. In his testimony Crandall says that he found from the schedules received from Rathbone & Company that they covered different amounts for each of the five roads and that the amounts for each of the five roads differed in almost all the items in each case; that the differences aggregated \$320,435 less in the 1896 schedules than in the 1895 schedules; that he telegraphed Helmick as soon as he discovered the difference in the schedules, which was on the same day he received them. He further says that he never received the 1896 schedules from Helmick, but that on January 15, the

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last day that bids could be submitted at Detroit, he received some schedules from Muir. He had, however, on the evening of January 14, 1896, at the request of Rathbone & Co. sent the company's bid on the revised schedules direct to Muir, and told Muir that the bid was to be considered for Rathbone & Co. The bid on the 1896 schedules was \$16,800.

The plaintiff testified that he had the bid of the defendant in his possession from December 18, 1895, but he never submitted it to any official of the Grand Trunk Railway.

At the close of all the testimony of both parties, the court, on motion of the defendant, instructed the jury to find for the defendant, which was accordingly done. After overruling a motion for new trial the court entered judgment upon the verdict.

COLIN C. H. FYFFE, for plaintiff in error.

BATES & HARDING, for defendant in error.

MR. JUSTICE SMITH delivered the opinion of the court.

This suit was brought upon the theory that a contract was made between plaintiff and the defendant for commissions upon which the plaintiff was entitled to recover. Counsel for plaintiff in error very properly say in argument that the agreement between plaintiff and defendant in error for the placing with the latter of the insurance in question is almost wholly, if not quite, contained in the correspondence between the parties. There is no conflict of evidence in the case. As to the terms of the agreement the evidence is clear and certain. The agreement was that if Helmick should be the first one to furnish the defendant with the schedules of the railroad companies mentioned upon which they desired insurance to be written for the year 1896, defendant would bid only through plaintiff, and if the insurance was awarded to defendant and taken out, defendant would pay plaintiff seven and a half per cent. commission upon the premium.

While the plaintiff endeavored to obtain from the defendant an agreement to the effect that the insurance should be

placed solely through him by his letter of November 30, 1895, in which he says: "About December 10 we will offer you five different schedules, but we see no way in which we can be protected unless we give you the names of all the roads whose schedules we will present to you and you close the same to us against competition from this date," this was promptly declined in the letter of defendant in reply, dated December 2, 1895. In that letter the defendant gives very good reasons for adhering to the rule of "First come, first served," and further says: "We can simply say to you, as I said in Chicago, that upon receipt of the schedules from you, if we have not already received them from other parties, and be open, we will send you our bid and thereafter will not bid to anyone else."

On December 3, 1895, probably before he had received the letter of defendant just referred to, plaintiff again tried to have defendant agree to secure him against competition and make him the sole broker for the insurance, in his letter of that date, but without success; for, in reply to this letter, under date of December 5, 1895, the defendant said: "We hold ourselves absolutely open on all these roads to whomsoever shall first present us with the schedules."

The agreement was therefore left by this correspondence in substance as we have above stated it, the defendant in every letter adhering to its first position in all that it said as to the terms of the arrangement. The correspondence clearly shows that the defendant declined to agree that the insurance on the railway lines mentioned should be placed through Helmick solely; but that the defendant would not bid through any other agent upon the schedules received first from Helmick, reserving the right to the defendant in all cases to bid through the party who should first furnish the schedules upon which bids were invited by the railroad companies.

The next inquiry is what was done by Helmick under this agreement. It appears that Helmick furnished to defendant the schedules of the railroad companies for 1895. It does not appear that the companies desired insurance on these

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schedules for 1896. It is to be inferred that they did not, for the reason that they prepared schedules for 1896 and in the nature of things these schedules were being prepared during the time the correspondence was progressing. It appears from the schedules for 1896 that the companies desired insurance on about \$320,435 less property than that enumerated in the schedules for 1895. The schedules also showed changes in the location and in the character and class of property.

The record shows that the defendant promptly bid on the 1895 schedules, and that the bid was afterwards returned upon Helmick's statement that 750 leased box cars had been returned to the owners, and that Helmick never communicated this bid to any official of the railroads at any time. Although Helmick had received the 1896 schedules on January 8, 1896, in his letter of January 11, 1896, he notified defendant that bids on this insurance must be in by January 15, 1896, he never furnished to defendant the schedules upon which the railroad companies desired insurance for the year 1896, so that it could formulate a bid thereon. Defendant received the 1896 schedules from Rathbone & Co. on January 11, 1896, and forwarded its bid thereon to Detroit on January 14, 1896, through or on behalf of Rathbone & Co.

It clearly appears, therefore, that plaintiff did nothing under the agreement to entitle him to the commissions sued for, and the instruction given by the Circuit Court to find a verdict for the defendant was properly given.

The judgment is affirmed.

Affirmed.

West Chicago Park Commissioners v. John Novak.

Gen. No. 11,658.

1. **SPECIAL ASSESSMENT JUDGMENT**—*when, cannot be questioned. A special assessment judgment cannot be attacked on jurisdictional grounds by one who has not only consented to but procured its entry.*

2. **REIMBURSEMENT**—*when provision for, in setting aside tax deed*

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should not be made. Where the tax upon which a deed is predicated is void, neither direct reimbursement, nor indirect reimbursement by finding the amount that the land is equitably benefited, should be provided for.

Bill to remove cloud. Error to the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1904. Affirmed. Opinion filed June 2, 1905. Rehearing denied June 23, 1905.

Statement by the Court. December 5, 1895, John Novak, defendant in error, filed his bill to set aside as a cloud a tax deed to sub-lot 5 in the re-subdivision of lots 22 and 23 in block 3 in Cook & Anderson's Subdivision in the west half of the northeast quarter of section 24, township 39 north, range 13 east of the 3d P. M., in Cook county, Illinois, acquired by the West Chicago Park Commissioners under a tax sale for the delinquent third and fourth installments of a special assessment levied by it for the completed portion of the boulevard improvement of West Twelfth street and Ogden avenue.

The bill set out amongst other things, and it is admitted by the answer of plaintiff in error, that in July, 1888, the plaintiff in error filed a petition and assessment roll for improving the West Twelfth street and Ogden avenue boulevard, and that judgment was entered on July 13, 1888, confirming said assessment roll; that after two installments had been paid by defendant in error, he defaulted in the payment of the third and fourth installments and his property was returned delinquent to the county collector; that at the July term, 1892, of the County Court, application for judgment was made by the county collector, and that judgment for sale was entered on July 13, 1892, against said property for the non-payment of the third and fourth installments of the assessment; that on November 3, 1892, the property was sold at tax sale to plaintiff in error, in default of other bidders, for said delinquent installments, amounting to \$362.96, and no redemption having been made a tax deed was issued thereon; that on July 3, 1895, an order was entered in the Circuit Court in the original assess-

ment proceedings decreeing that the court had no jurisdiction to enter its judgment of confirmation of July 13, 1888, and that said special assessment proceedings were null and void.

The cause being at issue was referred to a master in chancery to take proofs and report the same into court, together with his conclusions thereon. On July 9, 1902, the master filed his report in court in which he finds that the tax deed is null and void and a cloud upon complainant's property and should be set aside, and recommends a decree to that effect, and that Dennis Colbert, his assigns and grantees, should be decreed to execute and deliver to complainant a proper deed of conveyance releasing all right, title and interest in the property growing out of said tax sales.

To this report objections were filed before the master by plaintiff in error, which were ordered to stand as exceptions in court, and after hearing, the court entered a decree in accordance with the master's report.

ANDREW M. STRONG and H. S. MECARTNEY, for plaintiff in error.

No appearance for defendant in error.

MR. JUSTICE SMITH delivered the opinion of the court.

The bill of complaint in this case is based upon the theory that the assessment for default in payment of which complainant's land was sold and the tax deed in question was issued, was void and that therefore the subsequent sale and the tax deed issued thereon is void and of no legal effect. Plaintiff in error contends, on the other hand, that the judgment confirming the assessment is valid and cannot be attacked collaterally in this proceeding; that the decree of the Circuit Court of July 3, 1895, declaring the Circuit Court had no jurisdiction to enter the order confirming the assessment, and that the assessment and all proceedings therein be annulled and set aside and held for naught, was entered at a term of court subsequent to the term at which the order

confirming the assessment was entered and is therefore void and of no effect.

It appears that after the objections to the assessment roll were overruled and the order of July 13, 1888, was entered confirming the 'assessment, certain of the objectors, George R. Thorne and others (defendant in error not being one of them) appealed to the Supreme Court from the order of confirmation and the order was there held to be void for want of jurisdiction. *Thorn et al. v. West Chicago Park Com'rs*, 130 Ill., 594. Thereupon the cause was redocketed in the Circuit Court, at least as to appellants in that case, where it seems to have been pending as to certain objections to confirmation remaining undisposed of, and the order or decree of the Circuit Court of July 3, 1895, above referred to was entered. So far as the record shows there was no objection by the plaintiff in error to the entering of this order of July 3, 1895. The master finds in his report that this order was entered by the consent of plaintiff in error. This finding in our judgment was amply justified by the evidence for the following reasons:

The record shows that on July 9, 1895, the plaintiff in error passed "An ordinance for a special assessment for cost of completed portion of boulevard improvement of Twelfth street, from the west line of Ashland avenue to intersection of Ogden avenue, thence on Ogden avenue to east line of Douglas Park, in the city of Chicago."

The first section of the ordinance recites the adoption of the ordinance of January 9, 1888, and the special assessment proceedings under it in the Circuit Court, giving the number of the case above referred to in which the order and decree of July 3, 1895, was entered and reciting that order. The second section of the ordinance provides for a new special assessment to pay the cost of the completed portion of said boulevard improvement in accordance with "An act to enable Park Commissioners or Park Authorities to make local improvements and provide for the payment thereof," approved June 24, 1895, in force July 1, 1895.

The record further shows that on or about the same date

the plaintiff in error filed a petition in the County Court of Cook county, in which it set out the above mentioned proceedings in the Circuit Court of Cook county, and the order of confirmation of July 13, 1888, and the appeal of George Thorne et al. to the Supreme Court; the reversal of the order by the Supreme Court; the reinstatement of the cause in the Circuit Court and the entry by the Circuit Court of the order or decree of July 3, 1895; the adoption of the ordinance of July 9, 1895, quoting the same as a part of the petition and prays that the cost of the improvement may be assessed upon property benefited in accordance with the Act approved June 24 and in force July 1, 1895.

By reference to the Act referred to in the ordinance and petition, Hurd's Statutes (1899), p. 1242, and especially to Section 20 of the Act, it will be seen that plaintiff in error was of the opinion or was advised that, in order to bring itself fully within its provisions and to avail itself of the powers conferred thereby in making the new assessment, it was necessary to have a finding and decree of the Circuit Court that the special assessment therein confirmed had been set aside and declared void.

From these facts and considerations, and bearing in mind the condition in which plaintiff in error was placed with reference to this improvement by the ruling of the Supreme Court in the Thorne case *supra*, the master and the Circuit Court inferred, very naturally and properly, we think, that plaintiff in error consented to the entry of the decree of July 3, 1895.

Having not only assented to but procured, as we think, that decree to be entered and based its subsequent proceedings thereon, it does not lie in the mouth of plaintiff in error to say that the order was entered without jurisdiction in the court. Nor do we think plaintiff in error can claim in a court of equity that the validity of the judgment for sale upon which the tax deed was based cannot be questioned by defendant in error.

Plaintiff in error contends that inasmuch as the property of defendant in error was found to be benefited by the

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improvement to the amount of \$517.50 in the supplemental assessment proceedings in the County Court, an equitable charge is constituted against the property of defendant in error, which should be provided for in any decree setting aside the tax deed. We cannot agree with this contention. We know of no principle of law or equity by which the taxing power can validate or aid proceedings which it has abandoned, by subsequently instituted proceedings for the same purpose, or by which it may create an equitable charge against the property and make it available for the purpose here sought. The contention is clever, but unsound.

We do not think there is reversible error in requiring in the decree that plaintiff in error execute a conveyance releasing any apparent interest acquired under the tax deed. It is not unjust, whatever may be said of its necessity.

Finding no error in the record the decree is affirmed.

Affirmed.

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Gen. No. 11,716.

1. **VENDOR**—*what essential to establish claim against, for failure to deliver.* Where a contract of sale provides that certain acts are to be performed by the vendee before the vendor is bound to ship and deliver goods purchased, the vendee must show performance of such acts to enable him to recover damages for the failure on the part of the vendor to ship or deliver the goods.

2. **MEASURE OF DAMAGES**—*for failure to deliver in installments.* Where goods are to be delivered in installments, or as required by the vendee, the true measure of damages, in event of failure to deliver, is the difference between the contract price and the market price or value at the different times when such articles were required or ordered, and it is the difference between the contract price and the market price on the day or at the time of the failure to deliver, and not on some other day or time.

Action for damages for breach of contract, etc. Appeal from the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Heard in the Branch Appellate Court at the March term,

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1904. Reversed and remanded. Opinion filed May 16, 1905. Rehearing denied June 23, 1905.

Statement by the Court. This suit was commenced by Edward Browne, Robert L. Chapin, William P. Cary and Arthur C. Lombard, co-partners, doing business as Browne-Chapin Lumber Company, against the Sagola Lumber Company. Edward Browne was adjudged a bankrupt, and the Chicago Title & Trust Company, his trustee, was substituted in his place as one of the plaintiffs in the cause. The suit is for damages for breach of two contracts, one for the sale by the Sagola Lumber Co. (then known as the Lang Lumber Company) to appellees of a quantity of lumber and the other was for the sale of a quantity of shingles. The lumber contract provides that the defendant (appellant) agrees to sell to the plaintiffs (appellees) and the latter agrees to purchase all the lumber of the grades therein specified on hand at the defendant's mill at Sagola, Michigan, May 12, 1890, and to be manufactured by appellant from that date to November 30, 1890, at prices fixed for each item, except such portion of the stock as may be required by the Lang Lumber Company's yard at Iron Mountain, Michigan, all of the stock to be dressed and loaded as ordered by plaintiffs, free on board cars, Sagola, Michigan. The shingle contract provides that the defendant sells and the plaintiffs purchase all the extra *A* shingles of proper grade which are manufactured at the mill of the Sagola Lumber Co. from the date of the agreement, May 12, 1890, until November 30, 1890, "which amount it is agreed shall not be less than eight nor more than ten million pieces, also not less than one million of shingles, 5 to 10 inches clear butt, and also what extra No. 1 shingles Browne-Chapin Lumber Company may require to fill their orders in part car load." The above shingles were to be manufactured, commencing immediately after the date of the contract, and to be made and maintained up to the standard agreed upon.

The contract also provides: "The consideration to be paid by the Browne-Chapin Lumber Company is \$2.00 per thou-

sand on Extra *A*, \$1.25 per thousand on 5-inch clear, and 40 cents per thousand on Extra No. 1, at which prices the said shingles are to be delivered f. o. b. cars at Sagola, branded as directed and loaded on orders and at direction of Browne-Chapin Lumber Company, or their authorized agent or employee."

The plaintiffs in their declaration claim that they failed to get the lumber and shingles which they were entitled to under their contracts.

Plaintiffs introduced evidence tending to show that the defendant shipped to persons other than the plaintiffs lumber of the kinds mentioned in the lumber contract amounting, from the date of the contract, May 12, 1890, to November 30, 1890, to 737,244 feet, and the amount so shipped from November 30, 1890, to February 28, 1891, was 249,762 feet. They also introduced evidence tending to show that after the contract was made prices of the kinds of lumber mentioned therein advanced and that the market price of such lumber during the summer and fall of 1890 was greater than the contract price. There was according to the plaintiff's testimony considerable fluctuation in the market prices during the above period, but it does not appear when the advance commenced or what the market prices were at any particular time or times during the period referred to, or what such market prices were in 1891. This evidence was supplemented by the plaintiffs by evidence of a computation purporting to give the excess of the market price over the contract price of the various grades of lumber shipped to persons other than the plaintiffs. Such excess, according to the computation on lumber shipped between May 12, 1890, and November 30, 1890, amounted to \$1,369.29; and on lumber shipped between November 30, 1890, and February 28, 1891, to \$428.80. This computation is based in some instances upon the lowest market prices as shown by the testimony and in other instances upon prices in excess of the lowest market prices.

Plaintiffs also offered evidence tending to show shipments of lumber from April 7, 1891, to June 26, 1891, by the de-

fendant to W. E. Kelley & Co., to the amount of 188,935 feet, and that the difference between the contract price and the invoice prices to Kelley & Co. was \$324.33, offering no testimony as to the market price of such lumber in 1891.

As to the shingle contract the plaintiffs' evidence tends to show that the defendant shipped shingles from June, 1890, until late in the year 1890, or to the beginning of 1891; that the price of shingles advanced in 1890; that *A* shingles were worth from \$2.00 to \$2.25 per thousand, and that 5-inch clear shingles were worth from \$1.25 to \$1.60 per thousand during the fall and winter of 1890 and 1891. The evidence does not disclose what the market price of shingles was at any particular time or times during that period.

Plaintiffs' evidence further tends to show that the total number of *A* shingles shipped by defendant to plaintiffs from May, 1890, to April, 1891, was 2,964,000, and of the standard shingles 1,003,000; and a computation showing the difference between the 9,000,000 shingles called for by the contract and the 3,967,000 received, upon a basis of twenty cents advanced in shingles amounting to \$1,006.60, which was claimed as plaintiff's damages on the shingle contract.

In a general way plaintiffs' evidence tends to show that orders for shingles were sent to the defendant by the plaintiffs, which were not filled, but it does not show specific orders for a particular number and kind of shingles desired by the plaintiffs, and where to be shipped, a failure to ship them and the market price of such shingles at the dates of the orders or on the date when they should have been delivered.

Plaintiffs were allowed to show shipments of shingles made by the defendant to persons other than the plaintiffs during and subsequent to the period covered by the contract, amounting to 613,000, over the objections of defendant.

Defendant's testimony tended to show that a large number of the shipments of lumber made to other persons than the plaintiffs were made upon orders received by the defendant from its Iron Mountain yard, and that deducting those shipments the total amount of lumber shipped to other

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persons than the plaintiffs from May 13, 1890, to January 1, 1891, was 232,000 feet, and the amount so shipped from January 1, 1891, to April 1, 1891, was 158,200 feet. Defendant's evidence also showed that all the lumber shipped from defendant's mill to persons other than the plaintiffs or used by the defendant to meet the requirements of its Iron Mountain yard consisted of lumber rejected by the plaintiffs, or was thick lumber not included in the contract with plaintiffs. It appeared also that a large number of the shingles on hand at Sagola, May 12, 1890, had been sold to other parties at that time, and that a number of the shipments shown in plaintiffs' evidence were of such shingles.

The market price of shingles in large lots, such as called for by the shingle contract, did not vary, according to the testimony for defendant, from May, 1890, to January, 1891, *A* shingles being worth during that time \$2.00 per thousand; and the price of lumber of the character mentioned in the lumber contract remained steady during the same period.

The jury returned a verdict for the plaintiffs for \$3,250, and judgment was rendered on the verdict.

LAWRENCE P. CONOVER, for appellant.

FRED H. ATWOOD, FRANK B. PEASE, WILLIAM S. CORBIN and CHARLES O. LOUCKS, for appellees.

MR. JUSTICE SMITH delivered the opinion of the court.

We have given the substance of the evidence offered, not for the purpose of weighing it, but as the basis for the discussion of the questions of law raised on the record. We express no opinion upon the facts.

The lumber contract provides: "All the above stock to be dressed and loaded as ordered by said Browne-Chapin Lumber Company, f. o. b. cars Sagola, Michigan."

The shingle contract after specifying the amount of *A* shingles to be manufactured and the period of time therefor provides: "Also what extra No. 1 shingles Browne-Chapin Lumber Company may require to fill their orders in part

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carloads," and then after specifying the prices for the different grades of shingles provides: "At which prices the said shingles are to be delivered f. o. b. cars at Sagola, branded as directed, and loaded on orders and at direction of Browne-Chapin Lumber Company, or their authorized agent or employe."

Thus it appears that appellees (plaintiffs) under the lumber contract must first give directions for the dressing and loading of the lumber before appellant had a right to or could be required to ship it; and under the shingle contract plaintiffs must give orders and directions as to branding and loading before appellant could be required to deliver.

Where a contract of sale provides that certain acts are to be performed by the buyer before the seller is bound to ship or deliver the goods purchased, the buyer must show performance of such acts to enable him to recover damages for a failure on the part of the seller to ship or deliver the goods. 2 Meacham on Sales, Secs. 1081, 1082 and 1123; 2 Schouler's Personal Property, Secs. 281 and 285; L. N. A. & C. Ry. Co. v. Iron Co., 126 Ill. 294; Weill v. Am. Metal Co., 182 Ill. 128; Penn. Coal Co. v. Ryan, 107 Ill. 226. This principle is elementary and it is not and cannot be controverted.

Under the law a compliance with these provisions of the contracts required appellees to prove that certain specific orders were given describing the kind and quantities of lumber and shingles required with directions as to brands and shipments and when and where the same were to be shipped, and that such orders were not filled by appellant within a reasonable time thereafter. Until this was done appellant was not in default.

On the trial appellees offered testimony tending to show in a general way that orders were given to appellant for lumber and shingles, which were not filled promptly; but no proof was made of orders given for a specific quantity, kind and grade of lumber and shingles with directions as to how the lumber should be dressed or shipped as provided in the contracts.

This is an action to recover damages for non-delivery of

the lumber and shingles according to the provisions of the contracts of sale. The law is that where goods are to be delivered in installments, or as required by the purchaser, as in this case, the true measure of damages is the difference between the contract price and the market prices or values at the different times when such articles were required or ordered. *Smith v. Dunlap*, 12 Ill. 184; *Phelps v. McGee*, 18 Ill. 155; *Sleuter v. Wallbaum*, 45 Ill. 43; *Deere v. Lewis*, 51 Ill. 254. And it is the difference between the contract price and market price on the day or at the time of the failure to deliver and not on some other day or time.

The evidence must show the date of the demand, the failure to deliver and the contract and market prices at the date delivery should have been made. It was incumbent upon appellees to prove these facts as to each order for lumber and shingles, in order to lay the foundation for damages and furnish the true measure thereof. Appellees made no attempt, as shown by the record, to meet these requirements. Evidence as to the range of market values from the dates of the contracts until some time in the year 1891 was offered by appellees. But the evidence did not tend to fix the market prices at any particular time or times when orders were given or the lumber or shingles should have been shipped. This left the jury to guess or speculate as to the amount of the actual damages suffered by appellees. This was clearly erroneous.

The admission of the testimony of Mr. Browne as to the computation of damages on the basis of an average advance of twenty cents in the market value of shingles had no foundation in the evidence, and was therefore error. This is also true of his evidence as to the lumber. This method of proving damages has no sanction in the law, where the evidence before the jury, as in this case, does not give them the essential elements for the assessment of damages.

The verdict includes damages for shipments of lumber to persons at Iron Mountain. The uncontroverted testimony is that these shipments were for the use of the Iron Mountain yard under the reservation in the contract. In this regard

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and as to such items the verdict was contrary to the evidence.

The evidence of the shipments to Kelley & Co. should have been excluded for the reason that the evidence of the invoice prices to Kelley & Co. afforded no legal basis or rule of damages.

For the errors above indicated the judgment is reversed and the cause remanded.

Reversed and remanded.

United Breweries Company v. Charlie Bass, by next friend.

Gen. No. 12,011.

1. **ORDINARY CARE**—*when minor has not exercised.* A boy of ten years, who is of at least average intelligence, experience and capacity, has not, as a matter of law, exercised ordinary care where it appears by his own testimony that he saw the wagon which caused his injury approaching within ample time either to have crossed the street in front thereof or to have retraced his steps and reached a place of safety.

2. **JOINT JUDGMENT**—*what essential to sustain, in action of tort.* In order to sustain a joint judgment in an action of tort, it must appear that both defendants were guilty of the negligence charged in the declaration.

3. **ADMISSION**—*as to ownership, construed.* The admission of the ownership of the vehicle which caused the injury complained of, does not carry with it by implication an admission as to its control at the time of the injury.

4. **CONTROL**—*what overcomes presumption as to, arising from prima facie evidence of ownership.* The presumption arising from the name on the vehicle, that the party whose name appeared thereon was the owner thereof, and was, therefore, the employer of the men then having it in charge, is rebutted and overcome by the positive evidence of the driver thereof and his helper, that they were then in the employ of another and different party.

Action on the case for personal injuries. Appeal from the Superior Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the October term, 1904. Reversed and remanded. Opinion filed July 3, 1905.

Statement by the Court. Appellee brought an action in case for damages against appellant and the Citizens' Brewery. In the afternoon of October 17, 1900, in Maxwell street, at a point 75 to 100 feet west of Union street in the city of Chicago, appellee was run over by a two-horse beer wagon, and thus received the injuries of which he complains.

The declaration alleges that the horses and wagon were owned and used by appellant and its co-defendant in their business of the manufacture and sale of malt liquors, and was then and there in charge of certain of their servants; that the defendants negligently and improperly drove and managed said team; that they drove said team at the unlawful rate of nine miles per hour; and that they improperly drove said team upon and along the left-hand side of the street, whereby said team ran into and struck appellee, etc. The defendants united in a plea of not guilty. The jury found the defendants guilty and assessed plaintiff's damages at the sum of \$4,250. The plaintiff remitted \$1,750, and judgment was entered against the defendants for the sum of \$2,500. From the entry of this judgment appellant perfected the present appeal.

F. J. CANTY, E. E. GRAY and R. W. IRWIN, for appellant.

WING & WING, for appellee.

MR. PRESIDING JUSTICE BALL delivered the opinion of the Court.

The evidence of appellee tended to prove that the brewery wagon was driven south along Union street until Maxwell street was reached, when it passed west along the latter street on a line south of the center of the roadway, the horses being on a trot and going at eight or nine miles per hour; that appellee, a boy of ten years, was going home from school; that he walked south on the west sidewalk of Union street to Maxwell street, and there walked a few feet west along the north side of the last named street, and then proceeded in a southwest direction across the road-

way; and that when south of the center line of the roadway he was struck and run over by the beer wagon.

The evidence of appellant is that just before the accident a Bremner Biscuit wagon was passing west about six feet in advance and a little to the north of the beer wagon; that the speed of the beer wagon did not exceed four miles per hour; that appellee was riding on the low tailboard or rack of the Bremner wagon; that appellee suddenly and without any warning jumped from his place on the Bremner wagon and ran south and against the pole of the brewery wagon, was thrown to the ground and run over by the south wheels of the wagon; that the driver of the brewery wagon, when he saw appellee jump from the rear of the Bremner wagon, did everything in his power to avert the accident.

We have carefully studied the record in this case. Since the issues of fact may be again submitted to a jury for their consideration we refrain from quoting the evidence. The conclusion we have reached is that it is not shown that appellee used that degree of care and caution for his own safety which children of his age, intelligence and experience would use under like circumstances. His own testimony shows that he saw the beer wagon in ample time to have crossed the street or to have retraced his steps in safety. Appellee is shown to have been a child of at least average intelligence, experience and capacity to know and to appreciate the danger in attempting to cross the roadway in the face of the approaching team, which he saw when it was 50 or 60 feet distant from him.

Further, this judgment is joint. To support it the evidence must show the negligence of both of the defendants as charged in the declaration. It is not sufficient that the evidence shows one of the defendants is guilty of such negligence. It must also appear that the other defendant is guilty, or the joint judgment must be set aside and a new trial granted. A judgment at law is a unit. If it is not good as to all the defendants, it must be reversed as to all. It cannot be reversed in part and affirmed in part. *Hays v. Thomas, Breese*, 180; *Seymour v. Richardson F. Co.*, 205 Ill. 77, 81.

Just before appellee closed his case, the following colloquy took place between counsel for the respective parties:

"Mr. Newell: Now, with reference to the ownership of this wagon here: Will it be admitted, so as to get it into the record, that the United Breweries Company, at the time of this accident, had purchased the property of the Citizens' Brewery Company?

Mr. Irwin: Yes, sir; that is, we do not admit that it was their wagon that caused the accident.

Mr. Newell: But if it was the Citizens' Brewery wagon, then it was the property of the United Breweries Company?

Mr. Irwin: Yes, sir."

It will be noted that this admission goes no further than to the ownership of the beer wagon. It does not concede that the wagon was in the custody or control of appellant by its servant or servants at the time of the accident. The uncontradicted evidence is that it was not. Powers testified that on the day of this accident he was driving this wagon for the Citizens' Brewing Company. Harnke, the helper on the beer wagon, says, "I was working for the Citizens' Brewing Co. and Powers." It is entirely consistent that the wagon should be owned by one defendant and be run by the other defendant. Appellant cannot be held for damages in this case unless the servants then in charge of the beer wagon were its servants. The presumption, arising from the name on the wagon, that appellant owned it and was therefore the employer of the men then having it in charge, is rebutted and overcome by the positive evidence of the driver and of the helper that they were then in the employ of the other defendants. *Foster v. Wadsworth-Howland Co.*, 168 Ill. 514.

For the errors indicated the judgment of the Superior Court is reversed and the cause is remanded.

Reversed and remanded.

Herman Fry v. Henrietta Radzinski, et al.

Gen. No. 12,018.

1. **ASSESSMENT OF DAMAGES**—*when properly to be made upon dissolution of injunction.* Where the Circuit Court denies, but the Appellate Court grants a motion to dissolve an injunction, it is proper that such Circuit Court should proceed to assess the damages, the Appellate Court having no power so to do.

2. **ASSESSMENT OF DAMAGES**—*mandate of reversal not essential to, where injunction dissolved.* The trial court may proceed to assess the damages for the granting of an interlocutory injunction where the same has been dissolved by the Appellate Court, and this without the filing of the mandate of reversal where the cause, as an entirety, has never been removed from the *nisi prius* court.

3. **ASSESSMENT OF DAMAGES**—*when not premature.* An assessment of damages upon the dissolution of an injunction upon the face of the bill, is proper, notwithstanding that at the time of the taking of the evidence with respect to such damages no order disposing of the case has been entered.

4. **FORMER APPEAL**—*when decision in, binding.* The decision of the Appellate Court in ordering the dissolution of an injunction upon the face of the bill, is conclusive upon the question* of the sufficiency of the bill, when its sufficiency is questioned by demurrer.

Injunction proceeding. Appeal from the Circuit Court of Cook County; the HON. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed July 3, 1905.

Statement by the Court. Appellant filed a bill against appellees to enjoin them from collecting or paying over two judgments entered by the Circuit Court in favor of appellee in attachment, without personal service, against Frederick Franke and Adolphine Franke, one dated June 6, 1900, for \$2,520, and the other dated June 7, 1900, for \$2,160.

It is alleged that September 15, 1896, Frederick and Adolphine Franke delivered to appellant an insurance policy for \$5,000 issued upon the life of said Frederick by the New York Life Insurance Company, as security for \$5,000 loaned by appellant to said Frederick; that September 9, 1897, said Frederick and his wife, Adolphine, delivered to appellant an absolute assignment of said policy; and that appellant has

ever since remained in possession and control of such policy, which has not been redeemed, nor has said debt been paid; that in each of said attachment suits said insurance company was duly served as garnishee; that in the first suit said company in its answer admitted it had issued said policy to said Frederick, which by its terms would mature February 26, 1903, and should then be worth about \$4,150; and that in the second suit the answer filed by said company being lost, its contents cannot be given; that April 1, 1903, said company amended its answer in each of said suits, alleging that upon that day it had received formal notice of the assignment of said policy; that said assignment is marked "Received Dec. 21, 1897. Home office"; that April 3, 1903, judgment was entered against said company as garnishee in each of said suits, ordering it to pay over to appellee, Radzinski, the moneys due on said policy; that appellant had and has a valid and prior lien on said policy, and had no knowledge of the rendition of said judgments until long after the term of court at which said judgments were rendered had passed, and was, by reason thereof, precluded from setting up his claim by way of interpleader or otherwise. The prayer is for an injunction and for relief.

An injunction was awarded; a motion was made to dissolve the injunction, which was referred to a master, who reported, recommending that such motion be overruled for the present, and that action thereon be reserved until the final hearing. The chancellor confirmed the report of the master, whereupon Henrietta Radzinski perfected an appeal to this court. The case went to the Branch Court, which, on January 19, 1904, entered a decree reversing said injunctive order. After that appeal was perfected each of the appellees filed a general demurrer to said bill. March 4, 1904, said cause came again before the Circuit Court upon two motions, one by Radzinski to assess damages on the dissolution of the injunction, and the other by appellant to dispose of said demurrers. Over the objections of appellant the court admitted in evidence certified copies of the proceedings in the Branch Appellate Court and the testimony of

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counsel as to the amount of work done and the value thereof. The court fixed the value of such services at \$415, and sustained the demurrers to the bill. Appellant elected to stand by his bill, the court dismissed the same for want of equity. From this decree appellant perfected the present appeal.

WILLIAM E. HUGHES, for appellant.

NEWMAN, NORTHRUP, LEVINSON & BECKER, C. E. CLEVELAND and EDWARD O. BRYAN, for appellees.

MR. PRESIDING JUSTICE BALL delivered the opinion of the court.

Appellant contends: First. That as the Circuit Court refused to dissolve the injunction, and the Branch Appellate Court did dissolve it, the former court could not assess damages upon the dissolution of the injunction, for the reason that the statute provides (R. S. Hurd 1903, sec. 12, chapter 69, p. 1042) that the court dissolving the injunction must assess the damages. The language of that section is, "Where an injunction is dissolved by any court of chancery in this State, the court * * * shall hear evidence and assess such damages." The interpretation put upon this language by appellant is too narrow. The statute does not in terms provide that in such a case this court or the Supreme Court shall hear evidence and assess the damages. The practice and the construction are to the contrary.

In *Garrity v. C. & N. W. Ry. Co.*, 22 Ill. App. 404, where the injunctive order entered by the Circuit Court was reversed by the Supreme Court and the Circuit Court had assessed the damages, upon appeal this court said: "Appellants contend that, as the dissolution was the result of the action of the Supreme Court, taken in this suit upon a writ of error, the Circuit Court had no jurisdiction to assess the damages upon the dissolution which the Supreme Court directed; that the writ of error was a new suit, not a continuation of the old one. There is nothing in the point. When the injunction is dissolved by a court of chancery, as a result of regular proceedings, which in law are effectual to

bring about the dissolution, the defendants may have such damages assessed as they are entitled to before the dismissal of the bill."

Second. The Circuit Court had no authority to assess the damages until the mandate of the Appellate Court reversing the injunctive order had been filed in the Circuit Court in the way and manner prescribed in section 84, chapter 110, R. S. Hurd, 1903, p. 1411. Many cases are cited in support of this proposition, which we believe have no application to the present litigation. The main case was not removed from the trial court. Had the parties desired, they could have proceeded to a hearing upon the bill pending the interlocutory appeal. The statute providing for an interlocutory appeal declares "The force and effect of such interlocutory order or decree and the proceedings in the court below shall not be stayed during the pendency of such appeal." This case still remains on the docket of the Circuit Court; and hence no other steps were necessary to be taken in order to induce the court to act upon the question of damages than to inform the court as to what had been done with the interlocutory appeal. The certified copy of the proceedings of the Appellate Court in that regard was sufficient evidence.

Third. Appellant contends that the assessment of damages was prematurely made, that the court should not have taken up this question until the final hearing of the case. The statute provides: "The court after dissolving such injunction, and before finally disposing of the suit * * * shall hear evidence and assess such damages." R. S. Hurd, 1903, Section 12, Chapter 69, p. 1042. Here the injunction was dissolved on the face of the bill.

In *Martin v. Jamison*, 39 Ill. App., 248, the court, on page 257, said: "The correct rule, as we think, was stated by Judge Pleasants in *Gillett v. Booth*, 6 Ill. App., 429 viz.: 'When an injunction is the only relief sought and it is dissolved on motion upon the bill alone, which operates as a demurrer for want of equity, and admits all the facts alleged, the order of dissolution is a final disposition of the case, and the formal dismissal of the bill may regularly fol-

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low, but not otherwise;' which is supported in this State by the following cases: Titus v. Mabee, 25 Ill., 232; Hummert v. Schwab, 54 Ill., 142; Weaver v. Poyer, 70 Ill., 567."

The record shows but one order in assessing these damages and in dismissing the bill for want of equity, so that in effect the damages were not assessed until the final hearing of the case.

The evidence fully sustains the finding of the Chancellor as to the amount of the damages suffered by appellee Radzinski by reason of the suing out of the injunction in question.

Fourth. Appellant finally contends that the Circuit Court erred in dismissing the bill for want of equity upon a general demurrer.

In order to reach the conclusion that the injunctive order was improperly issued and should be reversed, the Branch Appellate Court had to pass and did pass upon the sufficiency of the bill. The law of the case as there announced controls us upon this second appeal, in which the same question, there passed upon, is here presented. Northern P. Ex. Co. v. Traders Ins. Co., 83 Ill. App., 513; Garrett v. Peirce, 84 Ill. App., 31; Wilson v. Carlinville Nat'l Bk., 87 Ill. App., 364; Gienan v. Town of Browning, 87 Ill. App., 418; Murphy v. Murphy, 93 Ill. App., 671; World's Columbian Exp. Co. v. Lehigh, 94 Ill. App., 433; Westbrook v. Frederickson, 97 Ill. App., 40; I. I. & I. Ry. Co. v. Otstot, 113 Ill. App., 37.

The motion made by the New York Life Insurance Company to dismiss the appeal as against it is denied.

The decree of the Circuit Court is affirmed.

Affirmed.

Clarence W. Marks v. Chicago Yacht Club.**Gen. No. 12,022.****Clarence W. Marks v. Columbia Yacht Club.****Gen. No. 12,442.**

1. *MOTION TO DISSOLVE—nature of, where predicated upon face of bill.* A motion to dissolve, predicated upon the face of the bill, is, in effect, a demurrer.

2. *ASSESSMENT OF DAMAGES—when allowance of solicitor's fees upon, proper.* Where the work of the solicitors was directed toward obtaining a dissolution of the injunction and had no reference to the merits of the case, except insofar as the law learned by counsel upon the investigation and argument of the motion might have been used afterwards (but was not) upon the merits of the bill, it is proper to predicate an allowance of damages thereon.

3. *ASSESSMENT OF DAMAGES—when amount of solicitor's fees, will not be disturbed.* The amount of the solicitor's fees to be allowed upon an assessment of damages upon the dissolution of an injunction, is, primarily, for the chancellor and when he has passed upon that question the Appellate Court will not disturb his finding unless it believes from an inspection of the whole record that the chancellor is clearly mistaken.

Injunctional proceeding. Appeals from the Circuit Court of Cook County; the Hon. LOCKWOOD HONORE, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed July 3, 1905. Rehearings denied July 13, 1905.

Statement by the Court. In May, 1901, appellant filed a bill against appellees and others, alleging that the Columbia Yacht Club was wrongfully constructing a clubhouse "immediately adjoining the inner breakwater on the east and just south of the south line of Randolph street produced," and that the Chicago Yacht Club was building a clubhouse on the Lake Front "at the foot of Monroe street produced," in the city of Chicago; and that such buildings obstructed his view of Lake Michigan and interfered with the right of ingress and egress from said Lake to his property. The prayer of the bill was that each of the appellees be restrained from erecting or continuing to erect its said building. May 21, 1901, an injunction, as prayed, was obtained without

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notice to appellees, or to either of them, and was at once served upon each of the appellees. Two days later the Chicago Yacht Club entered its appearance and filed a general demurrer to said bill, and also filed a motion to dissolve the injunction, giving notice that it would the next day ask the court to set the motion down for hearing May 25, 1901. May 24, 1901, the Columbia Yacht Club filed its general demurrer to said bill, and also filed a motion to dissolve said injunction. May 25, 1901, it had said motion set down for hearing two days later. Both motions came on for argument May 29, 1901. June 20, 1901, the Chicago Yacht Club withdrew its motion to dissolve the temporary injunction without prejudice, and it was ordered that the cause stand as though no such motion had been made. The Chancellor dismissed the bill as to certain defendants not here concerned, dissolved the injunction as to the Columbia Yacht Club, and retained the bill as to the latter club until the final hearing. The Chicago Yacht Club perfected an appeal to this court. By an order entered October 10, 1901, we reversed the injunctive order of the Circuit Court.

April 24, 1904, the original bill and cross-bills were dismissed for want of prosecution, the Circuit Court retaining jurisdiction solely for the purpose of assessing damages for the wrongful suing out of the temporary injunction.

Each of the appellees filed its separate suggestion of damages instantane. A hearing was had upon these suggestions in September, 1904, which resulted in decree from which this appeal was taken. At that hearing each of the appellees presented evidence relating exclusively to its own claim for damages, and the Chancellor by such decree found and fixed the damages of the Columbia Yacht Club at the sum of \$700; and also found and fixed the damages of the Chicago Yacht Club at the sum of \$1,200. The decree also required appellant upon an appeal to give an appeal bond to each of said Clubs, which was done accordingly.

STEIN, MAYER, STEIN and HUME, for appellant; PHILIP STEIN, of counsel.

ARNOTT STUBBLEFIELD, WILLIAM H. QUINLAN, N. W. HACKER and GEORGE B. SHATTUCK, for appellees.

MR. PRESIDING JUSTICE BALL delivered the opinion of the court.

Appellant contends that the decree of the Circuit Court should be reversed for the following reasons: First, because the services of solicitors upon which the claims were based were rendered upon the argument of the general demurrers to the bill and for services rendered in general defense of the case; second, because no discrimination was made upon the hearing between the services rendered in the general defense of the case and those rendered solely for the dissolution of the injunction; and third, because the allowance was excessive and oppressive and is not supported by the evidence. In brief, the contention of appellant is that no services which might be called for upon the merits of the case can be recovered for as rendered upon the dissolution of the injunction; while that of appellees is that services necessary and performed in the dissolution of the injunction are recoverable even though they also might be necessary upon the merits.

This was a bill for injunction only. A motion to dissolve the injunction granted upon such a bill is in effect a demurrer. "The only relief sought by the bill was to enjoin the sale of the property under the execution, and when the defendants entered their motion to dissolve the temporary injunction, it was for want of equity appearing on the face of the bill. The motion operated precisely as a demurrer, and by it the defendant admitted the truth of all the allegations relied upon to entitle the complainants to an injunction. The practice is to allow either a demurrer to the bill or a motion to dissolve the injunction, and either course produces precisely the same result, so far as the injunction is concerned." *Titus v. Mabee*, 25 Ill., 232. See also *Wangelin v. Goe*, 50 Ill., 461; *Shaw v. Hill*, 67 Ill., 456; *Live Stock Com. Co. v. Live Stock Exchange*, 143 Ill., 241.

The demurrers filed by the appellees were unnecessary.

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They were overruled and abandoned. Appellees filed motions to dissolve the injunction, and it was upon these motions that they moved the court to act. The decree of June 20, 1901, commences: "This cause coming on to be heard upon the motion of the defendants, Chicago Yacht Club and Columbia Yacht Club, to dissolve the temporary injunction heretofore granted herein." The appeal of the Chicago Yacht Club to this court was from the interlocutory order of injunction only. The evidence shows that counsel for appellees directed their efforts to the sole object of obtaining a dissolution of the injunction upon the face of the bill.

The question of fees for services in obtaining the dissolution of an injunction is statutory. Section 12, Chapter 69 R. S. Hurd, 1903, provides: "In all cases where an injunction is dissolved by any court of chancery in this State, the court, after dissolving such injunction and before finally disposing of the suit, * * * shall hear evidence and assess such damages as the nature of the case may require, and to equity appertain."

That appellees were severally damaged by the suing out of this temporary injunction is evident. Each was compelled to cease the construction of its clubhouse. Each was wrongfully enjoined from doing a thing it had a legal right to do. Each hired counsel to obtain the dissolution of that injunction, and thereby became liable to pay to such counsel a reasonable fee for services rendered in obtaining such dissolution. "The object of assessing damages is to compensate the party enjoined for the injury he has suffered." *Roberts v. Fahs*, 36 Ill., 268.

In *Keith v. Henkleman*, 173 Ill., 137, it was claimed that damages could not be assessed upon the injunction bond (among other reasons) because the "injunction was dissolved by motion on the face of the bill." The court say upon this point: "Damages are recoverable on an injunction bond whenever the injunction has been vacated either wholly or in part; and any order of court, relieving any part of the subject matter of the injunction from the operation of the injunction, is, as to such part, a dissolution of the injunction.

* * * Whether the assessment of damages is proper or not when an injunction is dissolved upon demurrer to the bill or upon motion to dissolve, will depend upon the question, whether the services of the attorney, sought to be assessed as damages, have special reference to the injunction, or are in general defense of the suit. Where counsel fees are necessarily incurred in procuring the dissolution of an injunction, they may be allowed as damages. When, however, they are incurred in defeating the suit generally, they cannot be assessed as damages." Such being the law of this State, we must refuse to be guided by decisions from sister States laying down a contrary rule.

The decree, from which this appeal was taken, finds that each appellee at the time the injunction was granted was engaged in the construction and completion of its club house; that upon being served with a copy of said injunction each ceased work and employed counsel to defend the suit and "to procure the dissolution of said temporary injunction." That the counsel so retained "immediately took up the matter of procuring the dissolution of said temporary injunction." It then goes on to state somewhat in detail the work thus done by counsel, and concludes by fixing the amount of damages in the case of each appellee. We have examined the evidence and find the conclusion reached by the Chancellor fully justified. The work done was directed toward obtaining a dissolution of the injunction, and had no reference to the merits of the case, except in so far as the law learned by counsel upon the investigation and argument of the motion might have been used afterwards (but was not) upon the merits of the bill. In such case it is immaterial that the labor actually expended upon the motion might have been expended as well upon the demurrer. Having been applied upon the motion with the result of bringing about the dissolution of the injunction, the successful party can recover damages under the statute.

Complaint is made that the damages are excessive and are not supported by the evidence. It is within the personal knowledge of this court that the questions of law arising in

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that class of suits which may be called Lake Front litigation, are many, and some of them are intricate. The property rights here involved were large. The amount of damages to be allowed is primarily for the Chancellor, and when he has passed upon that question we cannot disturb his finding unless we believe from an inspection of the whole record that he is clearly mistaken. *Lichtenstadt v. Fleisher*, 24 Ill. App., 94. In the present case we are satisfied that his finding is fully sustained by the evidence.

The decree of the Circuit Court will be affirmed in each of the above appeals.

Affirmed.

**Chicago Telephone Company v. Avery R. Hayes,
Administrator.**

Gen. No. 12,029.

1. **TELEPHONE COMPANY**—*not liable for fallen wire owned by city but strung on its poles.* Where the city required as a part of the consideration for the permission granted to a telephone company to erect poles, that it be given the right to use a portion thereof for its wires, the city cannot be held as the lessee of the telephone company and such company is not liable for an injury resulting from a fallen wire owned and controlled by such city.

Action on the case for death caused by alleged wrongful act. Appeal from the Superior Court of Cook County; the Hon. JOHN L. HEALY, Judge, presiding. Heard in this court at the October term, 1904. Reversed. Opinion filed July 3, 1905. Rehearing denied July 13, 1905.

Statement by the Court. This suit was brought against appellant and the city of Chicago for negligence which it is alleged caused the death of appellee's intestate. The declaration set up that the defendants were possessed of and using certain telephone poles and wires in a public alley in the city of Chicago; that there were near said telephone poles and wires other poles and wires highly charged with electricity; that defendants negligently suffered one of said telephone

wires to hang loosely from one of said telephone poles down to and upon and against one of said electric wires and down to and upon the ground, and thereby said telephone wire became charged with electricity and dangerous to any person coming in contact with the same; and that Charles Anderson, while in the exercise of due care, being entirely ignorant of the fact that said telephone wire was charged with electricity, and having no notice thereof, and in the performance of his duties, took hold of said telephone wire and was killed.

The alley in question is next west of Ashland avenue, which runs north and south in the city of Chicago. From Van Buren street, an east and west highway, the alley leads south. Half way down the block and on the west side of the alley is a barn, against which and in the alley stood a garbage box. At the southeast corner of the barn there was an electric pole owned and used by the Commonwealth Electric Company. In coming south in the alley from Van Buren street, and before reaching the barn, two telephone poles belonging to and used by the appellant are passed. Still further south than the pole of the Commonwealth Electric Company stood a fourth pole, which belonged to and was used by appellant. These four poles stood substantially in a north and south line in the alley and next its west line. The wires on the telephone poles were higher than and run over those on the electric poles. The electric wires carried 9,000 voltage. The other wires in this alley carried less than 500 voltage. It takes about 550 voltage to kill a man. An iron wire strung from the telephone pole south of the barn to the telephone pole next north of the Commonwealth Electric pole had broken at a point near the north pole, and had fallen down over the electric wires, and from them to the ground. About a week before the accident the lower end of this fallen wire had been picked up and had been wrapped around a post that formed a part of the garbage box. Twice a week the deceased, Charles Anderson, who was a garbage collector, in the employ of the city, came into this alley and cleaned out the garbage box. October 2, 1900, the deceased while in the line of his employment came to this garbage

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box, thrust his shovel into the box, and then touched or caught hold of this fallen wire and was instantly killed by the electricity with which it was charged. This fallen wire had become a live wire by reason of its resting upon one of the electric wires of the Commonwealth Electric Company at a point where the insulation of the electric wire was either originally imperfect or had been worn away.

It appeared that in January, 1899, the Common Council of the city of Chicago passed an ordinance authorizing appellant to construct, maintain and operate a line of telephone wires in the city. It is therein "Provided that the city of Chicago shall have the right to the top cross-arm of each of said poles free from charge for the use of the city telegraph and telephone wires."

It also appears that July 29, 1891, the Common Council granted permission to appellant to erect poles with the necessary wires and fixtures in this alley. This permit contained the following: "Said Company hereby agrees in its acceptance of this permit to save the City of Chicago harmless from any damage whatsoever arising in consequence of the erection and maintenance of said poles or the issuance of this permit."

The evidence on behalf of appellee and of appellant tended to prove that this fallen wire hung from the top cross-arm of said south telephone pole, the use of which cross-arm was given to the City, and that such wire was owned by the City. It was conceded that this wire had not been in use for several years. The defendant, the city of Chicago, denied that it owned the wire in question, and introduced evidence tending to prove that it had no wires in said alley at the time of the accident.

The jury returned a verdict finding the city of Chicago not guilty, and finding appellant guilty, and assessed the damages of appellee at \$3,500. Judgment was entered upon the verdict, and appellant perfected this appeal.

The principal grounds urged by appellant for a reversal are: the failure of appellee to prove the essential allegations of his declaration, viz.: the ownership, use or operation of

the broken wire by appellant and due care on the part of appellee's decedent; the failure of the court to instruct the jury, in effect, that appellant was not liable unless the wire was its property, and its giving the instruction, in its form of verdict, that a recovery might be had against one but not both of the defendants; and errors in the admission and exclusion of evidence.

HOLT, WHEELER & SIDLEY, for appellant.

EDMUND S. CUMMINGS, for appellee.

MR. PRESIDING JUDGE BALL delivered the opinion of the court.

The contention of appellant is, if it does not appear from the evidence that the fallen wire was owned or operated by it, the judgment of the court below must be reversed; while that of appellee is, that under the law appellant is liable for the death of Anderson whether the fallen wire was owned by the city or by the telephone company.

The preponderance of the evidence is that this fallen wire was owned by the city of Chicago. It was strung upon the top cross-arms of the telephone poles.

The franchises, rights and privileges of appellant were derived from the State and not from the city. The ordinance of January, 1899, was nothing more than permission to appellant to construct and to operate a line or lines of wires for telephone purposes in the streets and other public places of Chicago. For this permission the city demanded as a consideration the use of "the top cross-arm of each of said poles free from charge for the use of the city telegraph and telephone wires." Under this permit, and that of July 29, 1891, appellant erected these poles in this alley and the city placed on the top cross-arms of said poles the wire in question and used the same for its own purposes.

We do not think that either *Balsley v. Ry. Co.*, 119 Ill., 68, or *C. & G. T. Ry. Co. v. Hart*, 209 Ill., 414, cited by appellee, is in point. Between these cases and the one under consideration there is a radical difference. In each of those

cases it was held that where a company chartered to operate a railway leases the use of its right of way to another railway company, public policy requires that the lessor company shall be liable for all damages occasioned by the lessee company to others in operating its trains over the lines of the lessor company. This exceptional rule, by which a corporation may be held liable for defects in property it neither operates nor controls, is based upon the duty which is imposed upon it of seeing that no wrong is done through its chartered powers by persons to whom it has permitted their exercise. In consenting that the city might use the top cross-arm of each telephone pole, appellant did not confer any of its chartered powers or privileges upon the city. By the language of the permit the rights and privileges of appellant were limited to the cross-arms below the upper one. In no legal sense can the city, in the use of these top cross-arms, be considered the lessee of appellant. Still less was the city the agent or servant of or a contractor for appellant. It placed its wires on these cross-arms as it might have affixed them to the side of a building or to a tree standing on private grounds.

Counsel for appellee cite three cases in further support of his contention. In *Gray v. Boston Gas Light Co.*, 114 Mass., 149, the defendant, without the permission of the plaintiff, attached to the plaintiff's chimney a telegraph wire. Afterwards the chimney was blown down and falling into the street injured the horse and wagon of third persons, who brought an action against the plaintiff as the owner of the building. The plaintiff notified the defendant of the pendency of the suit and asked it to come in and defend, which it refused to do. Thereafter the plaintiff settled that suit, and then brought this action to recover the moneys thus paid out. The jury found that the telegraph wire pulled down the chimney. The defendant contended that Gray was not liable for acts of negligence or wrongdoing committed on his land or building by a stranger. But the court held to the contrary. Had the chimney fallen while the defendant was putting up the wire, Gray would not have been liable; but

the chimney stood for a considerable time after the wire was fastened to it. The court says: "The owner of a building, under his control and in his occupation, is bound, as between himself and the public, to keep it in such proper and safe condition that travellers on the highway shall not suffer injury. (Citing cases.) It is the duty of the owner to guard against the danger to which the public is thus exposed, and he is liable for the consequences of having neglected to do so, whether the unsafe condition was caused by himself or another."

In *Rockport v. Rockport Granite Co.*, 177 Mass., 246, it was held that if a derrick is maintained by a licensee on the land of his licensor with a guy stretched across a highway so low as to be dangerous to persons driving over the way, and the owner of the land knows of its existence and suffers it to remain there, this constitutes a nuisance, and such land owner is liable to any one injured thereby although the derrick was erected before he became the owner of the land. The *Gray* case, *supra*, is cited and approved.

In *Ainsworth v. Lakin*, 180 Mass., 397, it is decided that the owner of the wall of a building left standing after the building has been destroyed by fire, which would have to be taken down in order to rebuild, is liable for an injury caused by its fall after the expiration of a reasonable time for investigation and removal.

In each of these cases the owner of the defective property was held liable. To render the *Gray* case in point in the suit at bar, the injury must have been caused by some defect in the cross-arm or in the telephone pole. To make the *Rockport* case an authority here, it would be necessary for the fallen wire to have been owned by appellant, and then leased by it to the city. We are not able to see that the *Ainsworth* case has any application to the facts under consideration.

It is to be remembered that the death of Anderson was not caused by a defect in any cross-arm or in any telephone pole belonging to appellant, that the fallen wire was not owned or used or controlled by appellant, and that the current which gave the fallen wire its lethal character was not

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carried on the poles nor was it the property of appellant, but was owned and cared for by another corporation.

In *Quill v. The Empire, etc. Co.*, 159 N. Y., 1, the plaintiff while standing near a telephone pole belonging to the defendant was struck and injured by a glass insulator thrown from its pin in an attempt to change one of the wires. The person who did this was not in the employ of the defendant. After discussing the facts the court says: "The situation, then, so far as this defendant is concerned, is this: It turned over to another company the use of a part of its property, consisting of an arm of a telephone pole and the pins thereon, all of which were and still are in perfect condition; the Western Union Telegraph Company took possession of the pole, strung seven or eight wires thereon, and thereafter continued in the exclusive occupation of it down to the 27th of June, 1891, when an employee of the city government, having no relation whatever to any of the corporations owning or using the pole, went upon it for the purpose of making some temporary alteration in the position of the wires, and in attempting to do so lifted directly upwards a wire that rested against one of the pins, and which caught under the glass insulator, raised it up from the pin and threw it to the ground. The defendant is certainly not responsible, under this evidence, on the ground that it turned over to the Western Union Company the insulator thrown off, for it did not furnish it. Nor is it responsible for every act done or omitted on the lower arm of the pole, simply because it owns it. The neglect, if any there was, on the part of either the owner or occupant of the pole, was that of the Western Union Company in omitting to catch the insulator on the thread of the pin, and for its omission of duty the owner is not responsible."

In *Holmes v. Union T. & T. Co.*, 41 N. Y. S. R. 767 (affirmed on the opinion below in 139 N. Y., 651), the defendant owned and operated a line of poles strung with its wires in Glen Falls. A messenger service company also strung its wires upon the same poles, but without the affirmative consent of the defendant. The wires being weighted down

with snow, one of them broke and fell into the highway. The foot of the plaintiff was caught in this wire and he fell to the ground and was injured. The trial court charged that if this wire belonged to the defendant it was liable; but if it was the property of the messenger company, the defendant was not liable. The jury found for the defendant, and the plaintiff appealed. In affirming the judgment of the court below the Supreme Court say: "But it is insisted by the appellant that the fact that the defendant permitted the Messenger Company to attach its wires to the defendant's poles made the defendant liable in any event for the injury resulting from the negligence of the Messenger Company in negligently permitting its wires to become detached from the poles by reason of which the defendant was injured. Thus is presented the question whether a party who owns and possesses a structure lawful and safe in itself and who permits another, under an implied license, to use for a lawful purpose, some portion of the same, is liable for the negligence of the one using to third persons who are injured thereby. * * * The defendant owed a duty to the plaintiff and the public in relation to its own wire and wires in its possession and under its control. But it owed no duty to the plaintiff in relation to the wire of the Messenger Co., unless the Messenger Co. was the servant, employee or agent of the defendant. No such relation existed between the defendant and the Messenger Co."

The rule laid down in the Quill and Holmes cases we regard as the true one and as decisive of the case at bar, viz.: that under ordinary circumstances the ownership and use of property, which by reason of its defective conditions has caused an injury, furnishes the test of liability for such injury. Appellant, not having the ownership or control of the fallen wire, under the facts of this case, owed no duty to the deceased, who was to it a stranger. The top cross-arm of each telephone pole, as to its occupation and use, belonged to the city of Chicago. It was for that municipality to take care that its wires strung upon such top cross-arms, whether in or out of service, did not endanger others.

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It follows that the trial court erred in refusing to charge the jury, as duly requested by appellant, to find appellant not guilty. And having sent the case to the jury, it was reversible error for him to mark as "refused" the instructions tendered by appellant which defined the true relation of the fallen wire to the two defendants in the case.

The contention of appellee that appellant is liable in this action because it agreed to save the city harmless from any damage arising out of the erection and maintenance of the telephone poles, is not well founded. That indemnity is for the benefit of the city only, and third parties cannot take advantage of it.

What has been said renders the consideration of the other points made by appellant unnecessary.

The judgment of the Superior Court is reversed.

Reversed.

The Pullman Company v. Randall Woodfolk.

Gen. No. 12,086.

1. **FELLOW-SERVANT RULE**—*when statute of sister state abolishing, cannot be availed of.* Where such a statute provides for the service of a particular notice upon the employer, a failure to serve such a notice precludes the right of the servant to avail of such a statute, when suing in this State.

2. **FELLOW-SERVANTS**—*when conductor and porter of sleeping car are.* The conductor and porter of a sleeping car are fellow-servants insofar as their duties require that they shall during certain night hours keep watch over said car, one serving during one portion of the night and the other during the remainder thereof.

3. **DECLARATION**—*when does not state cause of action.* A declaration in an action for personal injuries, brought by the porter of a Pullman palace car against the company owning the same, charging it with negligence through the conductor of said car, does not state a cause of action when no neglect or violation of duty is alleged and no allegation is made that the plaintiff and such conductor were not fellow-servants.

4. **DECLARATION**—*when not aided by verdict.* A declaration which does not state a cause of action is not aided by verdict.

Action on the case for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. LOCKWOOD HONORE, Judge, presiding. Heard in this court at the October term, 1904. Reversed. Opinion filed July 3, 1905.

Statement by the Court. Appellee, hereafter called plaintiff, was a sleeping car porter in the employ of appellant, there defendant. March 15, 1900, the plaintiff left Chicago for the West in charge, as porter, of the sleeping car Ophir, which car belonged to and was then being used by the defendant. At Pueblo, Colorado, the Pullman conductors were changed, McWilliams then coming on duty as such. He and the plaintiff had not worked together until this time. The train reached Grand Junction, Colorado, at 12:30 in the morning of March 18, 1900. There the plaintiff was awakened by McWilliams and was told to transfer his passengers to the other sleepers, as the car Ophir was to be cut out of the train. While the plaintiff was transferring his passengers the car was cut out by the railroad employees and the train started west, leaving two passengers, McWilliams and the plaintiff in the car. The passengers went back to their beds. The plaintiff also retired. The rules of the defendant permitted plaintiff to go to bed as soon after ten o'clock as his duties would permit, leaving the conductor on watch. At three o'clock it was the duty of the conductor to awaken plaintiff, who would remain on watch from that time until morning. When the train left the station, the car Ophir stood on the main track. At two o'clock A. M. a railroad switch engine in charge of a railroad crew, pushing three passenger cars before it, came from the east and bumped into the car Ophir, and then pushed the four cars west to the yard limits, where it left them. The railway crew in charge of such engine then made up a west-bound freight train. When that was ready they went west and hitched to the four passenger cars, as they supposed, and placed them on a siding. It appears that when the three cars were pushed against the Ophir, that car did not couple, so that when the cars were placed on the siding the car Ophir was not there. From Grand Junction west the track is down grade. The Ophir

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not having coupled when the other cars were brought into contact with it, did not stop when it reached the west limits of the yard, and the three other cars were halted, but continued west by the force of gravity for about four miles before it came to a stop. At four o'clock A. M. the freight train westward bound left Grand Junction. Four miles out it struck the car Ophir, and thereby the injuries of which appellee complains were inflicted upon him. When the collision occurred the plaintiff was asleep in the smoking room of the car. The time was in his watch, but McWilliams had not awakened him. Immediately after the shock McWilliams, dressed in his underclothes only, came into the smoking room.

The first count of the declaration alleges, in general words, that the car was out of order and unsafe. It is not stated in what particular it was out of order, nor how the want of repair contributed to the accident. The second count charges that a certain wheel of the car was out of repair. The third count avers that the brake on the car was out of order. The fourth count avers in general language that the car was out of order, contrary to Section 1511a, Chapter 37, Mill's Annotated Statutes of Colorado. The fifth count sets up that the car was under the control and management of the Pullman conductor, and that by negligence of such conductor the plaintiff was injured, contrary to said statute.

Each count, numbered 1, 2, 3 and 4, alleges the ownership and operation of sleeping cars by the defendant; that the car Ophir was attached to a Denver & Rio Grande train in charge of a Pullman conductor; that plaintiff was porter in that car, under the control and direction of the conductor; and that by reason of the negligence charged in each count the said car was cut off from the train and was allowed to remain upon the main track until it was run into by another train.

The fifth count contains similar introductory averments, but does not allege that the car was cut off the train or run into; the allegation being that "by reason of the negligence

* * * the plaintiff * * * was thrown against and upon said car," etc.

At the close of the case for the plaintiff the defendant moved the court in writing to instruct the jury to return a verdict in its favor, but the court refused so to do. The court inspected the declaration and declared that the fifth count of the declaration only could go to the jury. At the close of all the testimony the defendant renewed its motion, to have the jury return a verdict for the defendant, but the court again denied the motion.

The case was submitted to the jury upon the fifth count, as is shown by the first and second instructions given to the jury at the request of the plaintiff. The jury returned a verdict finding the defendant guilty and assessing the plaintiff's damages at \$1,900. From the judgment entered upon such verdict the defendant perfected its appeal to this court.

RUNNELS & BURRY, F. B. DANIELS and C. S. WILLISTON,
for appellant.

DARROW, MASTERS & WILSON, for appellee.

MR. PRESIDING JUSTICE BALL delivered the opinion of the court.

It appears in evidence, and it is a matter of common knowledge, that appellant's chief business is the furnishing of sleeping accommodations for reward to passengers who have already paid the railway company for their transportation; that it never moves a car, and has no means of so doing; that its cars are attached to and detached from railway trains by the servants of the railway company on whose lines the cars are being hauled; that the moving power is furnished solely by such railway company; and that the duties of the servants of appellant in charge of the car are confined exclusively to the interior of the car, they having nothing to do with lights, brakes, signals or any other thing relating to transportation, or to the safety of the trains. Pullman Co. v. Smith, 73 Ill., 360.

In the case at bar the decision to cut out the car Ophir at

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Grand Junction was made by the railroad company; its employees made the necessary changes, and the train went on its way, leaving this car standing on the main track at that station. Shortly thereafter the railway employees backed three passenger cars against the Ophir and pushed them west, in order that they might have room to make up a west-bound freight train. It was the duty of these employees to see, when the three passenger cars struck the Ophir, that the latter car coupled with the car next to it. The evidence shows that these two cars did not couple, and that when the four cars, after being pushed west to the yard limits, were attempted to be stopped by the engine, three of them only obeyed, the car Ophir continuing to run down grade to the west on the main line. Here was the first negligence leading up to the injury of the plaintiff. After the freight train was made up, it became necessary to clear the main track so that that train could go on its way. To accomplish this, the railway employees coupled on to the east passenger car standing on the main track and set, as they believed, the four cars in on a siding. Reasonable care required them to see that they had all the cars off the main track. This duty they neglected, since but three cars were thus shunted into a place of safety. Nothing was done by any servant of appellant which in any way tended to put this car in the place it occupied when it was struck by the freight train. The servants in charge of the freight train were not guilty of negligence in running into this vagrant car. They believed and they had a right to believe that the switching crew had done its duty; they were on the watch for obstructions in their way, saw this car as soon as it came into view, and thereafter did what they could to avoid a collision, or at least to lessen its impact.

There is no direct evidence that the car Ophir when it reached Grand Junction was out of order generally, or that one of its wheels was in a state of disrepair, or that its brake was out of order. The evidence gives no other reasons for setting out this car at that station than the statement of Murphy, the switchman, that Daly, the night yard master, or

Coffin, the foreman, told him, Murphy, that this car was in bad order and had to be set off the train. It follows that the order of the trial judge that the fifth count only could go to the jury was correct. Even if the court had submitted the case upon the entire declaration the plaintiff would not have been advantaged thereby, for the reason that the evidence would not sustain a verdict upon either of the first four counts of the declaration.

The Colorado statute was intended to enlarge the common law liability of employers in personal injury cases by wiping out the doctrine of fellow-servant. But that statute provides, in section 1511b, that "no action for the recovery of compensation for injury or death under this act shall be maintained unless written notice of the time and place and cause of the injury is given to the employer within sixty days, and the action is commenced within two years from the occurrence of the accident causing the injury or death." It is not claimed by the plaintiff that any such written notice was given. Indeed, by negative pregnant it is admitted that the statute was not complied with in this respect, for in place of the written notice he attempts to substitute a talk he had with certain officials of appellant after his return to Chicago.

Where an additional right is given by statute, upon a certain expressed condition, the performance of that condition is necessary and proof of such performance must be made before the additional right is granted to one claiming it or under it. Therefore the plaintiff is not aided by the Colorado statute, and we must decide this case without reference thereto.

The fifth count alleges that said car was attached to a train running over and along the tracks of the Denver & Rio Grande Railway Company in the State of Colorado, "which car was under the control and management of one of the agents of the defendant Company commonly called the Pullman Car conductor," that the plaintiff was porter on said car, "and whereas it then and there became the duty of the said defendant company through its superintendent, the Pullman car conductor, to exercise care for the safety of the

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said plaintiff in this case, nevertheless, by reason of the negligence of the said Pullman car conductor hereinabove mentioned, plaintiff being then and there in the exercise of all due care and caution for his own safety, was injured contrary to the statute of the State of Colorado," (citing it) "and by reason of the negligence * * * the plaintiff * * * was injured," etc. This count sets up the duty of appellant, through its conductor, to exercise care for the safety of the plaintiff, but no neglect or violation of that duty is alleged. Nor is it averred that the conductor and the plaintiff were not fellow-servants. The count states no cause of action. Therefore it will not sustain a verdict. Nor is a count thus defective cured by verdict nor by the Statute of Amendments and Joinders. This objection is preserved by appellant's motion in arrest of judgment.

"It is a well-established rule that a declaration, in cases of this character, must state facts from which the law raises a duty from the master to the servant, and if the declaration fails in this regard, then it is insufficient to support a judgment. As stated in *Ayers v. City of Chicago*, 111 Ill., 406, 'the pleader must state facts from which the law will raise the duty.' And as said in *Cooley on Torts* (2nd ed.) 791: 'The first requisite in establishing negligence is to show the existence of the duty which it is supposed has not been performed.' And Mr. Thompson, in his work on *Negligence* (2 Thompson on Negligence, 1244) says: 'Unless the duty results in all cases from the stated facts, the declaration so framed will be bad.'" *Mackey v. Northern Milling Co.*, 210 Ill., 115; S. C. 99 Ill. App. 57, and cases cited.

The negligence, if any, of the conductor was in not calling the plaintiff to go on watch at 3 A. M., an hour before the accident happened, and in not discovering the dangerous position of the car and warning the plaintiff of that danger. The evidence shows that these two men stood watch and watch. It was the duty of the conductor to keep watch from 10 P. M. to 3 A. M. of every night he was in actual service, and at the latter hour to awaken the plaintiff in order that he might go on watch from then until morning.

The one rightfully sleeping had a right to rely upon the watchfulness of the other. It is clear that these two servants of appellant were fellow-servants under the definition of that relationship so often announced by our Supreme Court. It is true that in some matters the conductor was over the plaintiff, but in this regard they were on the same level. *Meyer v. Ill. Cent. Ry. Co.*, 177 Ill., 591; *Chicago City Ry. Co. v. Leach*, 208 Ill., 198.

It follows that the motion of appellant to have the jury peremptorily instructed to find a verdict for appellant should have been granted.

The after submission of questions of fact to the jury by instructions offered by appellant did not waive the question of law presented in the motion for a peremptory instruction. *Ill. Cent. Ry. Co. v. Swift*, 213 Ill., 307, 313.

The judgment of the Circuit Court must be and it is reversed.

Reversed.

Charles C. Landt, et al., v. James C. McCullough.

Gen. No. 12,021.

1. **ERASURES AND ALTERATIONS**—*when do not render written instrument incompetent.* Where the party offering such an instrument testifies that the same is in the same condition as when originally executed, and such testimony is corroborated by circumstances, erasures and alterations appearing on the face of the instrument do not render the same incompetent.

2. **VARIANCE**—*when question of, cannot be raised.* The question of variance cannot be first raised on appeal.

3. **RENT**—*possession not essential to liability to pay.* The liability of a tenant to pay rent is not dependent upon his having possession.

4. **MOTION FOR NEW TRIAL**—*when grounds of, waived.* Where a written motion specifying grounds for a new trial has been filed, grounds not specified are waived.

Action of assumpsit. Appeal from the Superior Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed July 3, 1905.

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FOLLANSBEE, McCONNELL & FOLLANSBEE, for appellants.

E. W. ADKINSON, for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

James C. McCullough, the appellee, by written lease of date March 20, 1889, demised to James M. Stebbins certain premises therein described for the term of fifty years from May 1, 1889, reserving as rent therefor \$1,050 per annum, payable in quarterly installments of \$262.50 each, on the first days of August, November, February and May for the first sixteen years of the term, the rent for the remainder of the term to be fixed by revaluation, as in said lease provided. The lessee, by the lease, agreed to pay all taxes and assessments which might be levied on the demised premises for the year 1889, and each subsequent year of the term, before application for judgment for the same should be made, the lessor to have the privilege of paying any of such taxes or assessments, after the same should become due, the amount to be so advanced by the lessor to be so much additional rent due from the lessee on the next rent day.

October 12, 1892, Stebbins, lessee, by written instrument under seal, assigned all his right, title and interest in said lease to Charles C. Landt and Will H. Moore, the appellants, and acknowledged his signature to the assignment before a notary public. At the same date, James C. McCullough, by written instrument under seal, assented to said assignment, and acknowledged his signature before a notary public. The assignment, assent of McCullough and the acknowledgments were with the copy, recorded in the recorder's office of Cook county October 17, 1892. Appellee, claiming that the appellants had paid no rent since January 22, 1897, sued them in assumpsit, and the jury, by the court's instruction, found for appellee and assessed his damages at the sum of \$1,000.

The defense of appellants in the trial court consisted wholly of objections, which will now be considered. The lease and also a copy of the lease, to which latter the assignment from Stebbins, the lessee, to appellants, was attached,

were objected to as evidence, on the ground that material alterations and interlineations appeared thereon.

Mr. McCullough, before the original lease was admitted in evidence, testified that when he and Mr. Stebbins signed it, it was in precisely the same condition as when it was produced on the trial. The witness further testified, in substance, that a duplicate of the lease (which is the copy above referred to) was signed by him and Stebbins, and that he retained one copy and the other went to the lessee, Stebbins, and subsequently to appellants, the assignees; also, that after the two papers, namely, the assignment from Stebbins to appellants, and the written assent of witness, were signed by Stebbins and witness, they were delivered to C. C. Landt and Will H. Moore, the appellants.

Appellants' counsel devote some 15 printed pages to the discussion of alleged erasures, etc., notwithstanding the testimony of appellee that when he and Stebbins, the lessee, signed the lease, it was in precisely the same condition as at the time of the trial, and also notwithstanding an accurate copy of it went into appellants' hands, at the time of the execution of the assignment by Stebbins, and they paid rent in accordance with the terms of the lease from October 12, 1892, until January 22, 1897. The copy which went into appellants' possession, when they took the assignment, is, as before stated, an exact copy of the original, in fact both are originals, and it will hardly be claimed that appellants changed their copy. We must endeavor to be guided by common sense, and not permit ourselves to become entangled and lost in a maze of thinly-disguised subtleties.

Counsel argues with apparent rather than real seriousness, as we think, that the evidence is insufficient to prove delivery of the lease to Mr. Stebbins, the lessee, in such manner as to bind appellants. The proof is uncontradicted that the lease was delivered to Mr. Stebbins. Counsel urge that the evidence of acceptance of the assignment of the lease is insufficient. Is it? The evidence is that the written assignment was delivered to appellants; the assignment with the consent thereto are both written on paper on which is the

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professional card, "Will H. Moore, Attorney at Law, 150 Dearborn Street, Chicago," and the assignees paid rent for about five years.

It is next urged that the court erred in admitting evidence of payment by appellee of the taxes levied on the demised premises for the year 1900. The appellee put in evidence a tax receipt of date May 28, 1901, showing payment of taxes on said premises for said year amounting to \$213.35. By the terms of the lease appellee was authorized to pay these taxes, at any time after they became due, the amount thereof to be so much additional rent due the next rent day. The taxes of 1900 became due prior to May 1, 1901. But counsel say there was a variance between the declaration and the evidence, the averment in the declaration being, without a *videlicet*, that appellee paid \$216.78. This, if counsel could at all avail of it, it is now too late to urge, as no objection was made to the receipt, in the trial court, pointing out specifically in what the variance consisted.

It is objected that no proof was offered of the amount of rent due. The lease shows on its face the reserved rent, and appellee testified, without contradiction, that the last rent received by him from appellants, he received January 22, 1897.

It is urged that there is no evidence that appellants went into possession. It is too great a tax on our credulity to be asked to believe that appellants paid rent for nearly five years, without enjoying the property. Besides, the liability of appellants does not depend on their possession. *Babcock v. Scoville*, 56 Ill., 461.

Lastly, counsel say that the evidence did not warrant a verdict for \$1,000. Appellants filed a written motion for a new trial, and it is not urged as a reason for the motion that the damages are excessive. Therefore they are not in a position to make this objection. *R. R. Co. v. McMath*, 91 Ill., 104. However, the evidence warranted a verdict for a larger sum.

We have tried to be patient with counsel; but must admit that it is extremely irksome to be compelled to consider so

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many trifling objections; objections which merely serve to illustrate the want of a substantial defense.

The judgment will be affirmed.

Affirmed.

Mary Lies v. Elizabeth Klaner.

Gen. No. 12,088.

1. **SUMMONS**—*power of court to authorize signing of return to.* A court of chancery has power, even after the rendition of a decree, to permit the sheriff to sign the return made on the summons, a sufficient showing having been made.

2. **MASTER**—*when proceedings before, cannot be questioned.* Where no objections have been filed, proceedings had before the master cannot be questioned on appeal.

Foreclosure proceeding. Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed July 3, 1905.

MORTON T. CULVER for appellant.

SIMON STRAUS, for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a decree foreclosing two trust deeds on a bill filed by appellee against appellant and others. The defendants to the bill are very numerous; many of them were defaulted and the bill taken for confessed against them. Mary Lies, the appellant, answered, a guardian *ad litem* was appointed for a number of minor defendants, and they answered by their guardian. Replications were filed to the answers, and the cause was referred to a master to take proofs and report the same, with his opinion on the law and evidence. The master found and reported that the material allegations of the bill were true and recommended a decree as prayed by the bill, and the court decreed accordingly. No evidence was introduced before the master by appellant, nor did she file any objection to the master's

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report or any exceptions to his report in the Superior Court.

Counsel for appellant contends here that the court did not acquire jurisdiction of certain minor defendants for whom he did not and does not appear. The facts in regard to these defendants, George Lies, Katherine Bester, Henry Bester and Mary Lies (not the appellant), are, that summons was returned by deputy sheriff Hoffman served on each of said defendants, by delivering a copy thereof personally to each of them, and that the deputy sheriff, by inadvertence, omitted to sign the sheriff's name, by himself as deputy, to the return, and the court, December 17, 1904, after the rendition of the decree of forclosure, which occurred May 16, 1904, on motion of appellee, and notice to all the defendants and to appellant's solicitor, and on examination of the deputy sheriff on oath, in open court, entered an order the granting part of which is as follows: "Now, therefore, leave is hereby granted to said Thomas E. Barrett, Sheriff of Cook County, by F. N. Hoffman, his deputy, to amend his return of the service of summons on the defendants, George Lies, Katherine Bester, Henry Bester and Mary Lies, as the same was endorsed on the original summons issued by the clerk of this court, by subscribing and signing the name Thomas E. Barrett, by F. N. Hoffman, deputy, to the return of the service of summons on the defendants, George Lies, Katherine Bester, Henry Bester and Mary Lies, as heretofore endorsed hereon", whereupon, the said deputy sheriff produced the original summons with his return endorsed thereon, and signed the return, "Thomas E. Barrett, Sheriff, by F. N. Hoffman, deputy." That the court had ample power to authorize the signing of the return is settled in the following cases: *Dunn v. Rodgers*, 43 Ill., 260; *Nat. Ins. Co. v. Chamber of Commerce*, 69 Ill., 22; *Grassly v. Adams*, 71 Ill., 550; *Chicago Planing Mill Co. v. Merchants' Nat. Bank*, 97 Ill., 294; *County of La-Salle v. Milligan*, 143 Ill., 321, 344-5.

All other objections made by appellant's counsel, in argument, relate solely to the proceedings before the master. As before stated, no objection was filed to the master's report,

nor was any exception filed in court. Counsel for appellant cannot be heard here to object for the first time. "The master's report must be held to be conclusive of all questions covered by it not excepted to." Cheltenham Improvement Co. v. Whitehead, 128 Ill., 279, 285.

The decree will be affirmed.

Affirmed.

**Chicago City Railway Company v. John Schaefer, by
next friend.**

Gen. No. 12,007.

1. JUDGMENT—*when unit.* A judgment in tort is a unit and must be either reversed or affirmed as such.

2. DEPOSITION—*when re-transmission of, to commissioner, ground for suppression of.* A motion to suppress depositions should be granted where it appears that the court ordered and allowed one of the parties, over the objection of another, to withdraw such depositions, already opened and filed, and send them by private communication to the commissioner who took them, for amendment.

3. DEPOSITIONS—*when alterations in, ground for suppression of.* Where the language used by the witness is changed by the commissioner after it has been subscribed and sworn to, a motion to suppress should be granted.

4. CROSS-EXAMINATION—*when, proper, as bearing upon credibility of witness.* Any questions on cross-examination seeking to show the relation between the witness and the party calling him, are, on general principles, competent as affecting credibility.

5. CROSS-EXAMINATION—*latitude to be allowed upon, as to movements of plaintiff at and prior to his injury.* Cross-examination upon such subject should not be limited by the court to the precise time of the accident, but should be allowed as to a reasonable time preceding.

6. MEASURE OF DAMAGE—*instruction upon, held erroneous, in using phrase, "all injuries."* The use of this phrase is erroneous in that it would authorize a verdict based in part upon mental suffering and chagrin, not the direct result of physical pain, but caused by bodily defects which are the result of the accident.

7. MEASURE OF DAMAGES—*instruction upon, held erroneous in authorizing allowance to plaintiff during minority for loss of earning power.* An instruction which authorized the jury to allow to a minor plaintiff damages for loss of earning power during his minority, is erroneous; such damages, if sustained, can only be recovered by the parent of such a plaintiff.

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8. *PASSENGER—when instruction erroneous in assuming relation of.* An instruction which assumes that the plaintiff was in the care of the company, because he was a passenger, is erroneous, where it was a distinct defense interposed on the trial that the plaintiff had assumed the risk of accident from his exposed position, by unnecessarily refusing to abandon it at the request of the defendant's agent.

9. *PASSENGER—when assumes risk.* A passenger who rides on the foot-board outside of a car, when it is reasonably practicable for him to take his seat within it, assumes the risk of his position.

10. *JOINT LIABILITY—instruction as to, erroneous.* An instruction as follows: "The court instructs the jury that under the law and evidence of this case, they can find both defendants guilty, or both defendants not guilty, or either one of the defendants guilty and the other defendant not guilty,"—is erroneous in an action on the case for personal injuries.

11. *INSTRUCTION—what not test of impropriety of.* An instruction reasonably capable of an interpretation which would materially mislead the jury, is ground for reversal, notwithstanding the jury may have taken it in the proper sense in which it was intended.

12. *INSTRUCTION—when, upon subject of paramount rights of street car company to tracks, erroneous.* Where the paramount rights of a street car company, co-defendant in an action, for negligence, are not at issue in the cause, it is error to present them to the jury in such a way as to suggest that they are, where such presentation might operate to the prejudice of the co-defendant of such company.

13. *REMARKS OF COUNSEL—when improper.* It is improper for counsel in his argument in a personal injury case to refer to the fact of the plaintiff's orphanage.

Action on the case for personal injuries. Appeal from the Superior Court of Cook County; the Hon. OSCAR E. HEARD, Judge, presiding. Heard in this court at the October term, 1904. Reversed and remanded. Opinion filed July 3, 1905.

Reporters' Note. The rulings in this case refusing to suppress the depositions, were made by a judge other than the one presiding at the trial.

Statement by the Court. This appeal was consolidated for hearing with the separate appeal taken from the same judgment by Joseph Stockton Company, No. 12,030 in this court.

The judgment appealed from is for \$10,000, and was rendered in the Superior Court against the Chicago City Railway Company and Joseph Stockton Company (herein-

after called defendants) in favor of the appellee (hereinafter called plaintiff), who was a minor and sued by his next friend. It was rendered July 9, 1904, on the verdict of a jury in an action brought by the plaintiff, for injuries sustained through the alleged negligence of the defendants in respectively operating an electric car and a wagon drawn by horses. The declaration on which the cause was tried alleges that the plaintiff was a passenger on the car of the defendant, The Chicago City Railway Company, and was in the exercise of all due care and caution for his own safety, and the defendants so negligently operated their said car (belonging to the Railway Co.) and their wagon (belonging to the Stockton Co.) respectively as to cause the said car and wagon to run into and collide with each other, by reason of which the plaintiff was crushed between the car and wagon, dragged from the car and thrown on the ground and badly injured, rendered blind in his left eye and otherwise damaged. The *ad damnum* was placed at \$50,000.

Each defendant pleaded the general issue to the declaration.

The Chicago City Railway Company, December 26, 1902, moved for a rule on plaintiff to file a bill of particulars, which motion the court overruled January 17, 1903. To this ruling the City Railway Company excepted, and it is assigned for error here.

The Joseph Stockton Co. took the deposition of W. B. Affleck in Philadelphia, in its own behalf, and it was opened and filed May 2, 1904. On May 3, 1904, the Chicago City Railway Co. moved to suppress it, for reasons in the opinion following noted, and the motion was overruled, to which ruling the railway company excepted. It was then ordered by the court "that the Joseph Stockton Company withdraw said deposition from the files and return it to the Commissioner before whom it was taken, and that the said Commissioner amend and correct the certificate to the said deposition and return it herewith to the Clerk of this Court." To this order the railway company excepted. Thereupon, on May 3, 1904, the Joseph Stockton Company, by its at-

torneys, withdrew the deposition from the files and sent it by a private communication through the mail to the Commissioner at Philadelphia before whom it was taken. May 9th the Clerk of the Superior Court again received through the mail and opened and filed the said deposition of Affleck, which had an addition to the Commissioner's certificate and some other changes, to be noted in the opinion. The Chicago City Railway Company May 12, 1904, moved to suppress said deposition as "amended and changed and re-filed." This motion the court overruled, and the City Railway Company excepted to the ruling. The motion of the City Railway Co. thus appears in the bill of exceptions relating thereto, although in other parts of the transcript of the record it is called a motion "to strike the deposition from the files." When counsel for the Joseph Stockton Company proposed to read the said deposition at the trial, The Chicago City Railway Co. objected to the reading on the grounds set forth in the motions to suppress. The court overruled the motion and the railway company excepted. Various questions and answers in the direct examination by the Stockton Company and the cross-examination by the Railway Company, contained in the deposition, were objected to and excluded on the motions of the Chicago City Railway Company and the Joseph Stockton Company, respectively, and to the exclusion in each case exception was taken by that one of the co-defendants not making the motion. The plaintiff joined in some of the objections. Some objections made by the Joseph Stockton Company to cross-interrogatories of the City Railway Company were overruled, and to this the Stockton Company excepted. The two defendants have each in their assignments of error in this court covered the rulings in regard to the Affleck deposition and its contents which they respectively complained of when made.

Various rulings on the admission and exclusion of other evidence were made by the trial court during the trial, which were excepted to by one or the other or both of the defendants, and which are covered by their respective assignments of error.

The jury trial began on May 26, 1904, and lasted until June 2, 1904. On June 1 the Chicago City Railway moved for a continuance of the cause on the ground of the absence of a material witness, and in support of said motion presented certain affidavits. The plaintiff and the defendant, the Joseph Stockton Company, objected to a continuance of the case and each refused to admit that the witness would have testified as set forth in one of the affidavits presented. The Court overruled the motion for a continuance, to which ruling the City Railway Company excepted. It is assigned as error.

At the close of the plaintiff's evidence the City Railway Company requested the Court to instruct the jury to find the Chicago City Railway Company not guilty, and on the request being refused, excepted to the ruling. The Stockton Company thereupon made a similar request concerning the Joseph Stockton Company, and excepted to the refusal of the court to accede thereto. These motions were respectively renewed at the conclusion of all the evidence. They were again each denied, and to this ruling as to its motion each defendant respectively excepted, and the rulings are in this court assigned for error.

Two instructions were asked by the City Railway Co. (numbered 1 and 2) before the argument of the cause to the jury was begun by counsel. These were refused, to which exception was taken by the railway company.

Some remarks in the closing address of plaintiff's counsel to the jury were objected to by counsel for the City Railway Company, and they are assigned as error.

After the arguments the court gave to the jury, at the request of the plaintiff, instructions numbered 3 and 4, to the giving of which both defendants excepted.

At the request of the defendant, the Chicago City Railway Company, the court gave to the jury twenty-seven instructions, numbered from 5 to 31 inclusive. To the giving of each of these instructions the Joseph Stockton Company excepted. At the request of the defendant, the Joseph Stockton Company, the Court gave to the jury ten

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instructions, numbered from 32 to 41, inclusive. To the giving of each of these instructions the Chicago City Railway Company excepted. The refusal of instructions 1 and 2, and the giving of instructions 32 to 41, are assigned as error by the railway company, and the giving of instructions 5 to 31 by the Joseph Stockton Company, while both Railway Co. and Stockton Co. assign as error the giving of instructions 3 and 4.

Separate motions for a new trial were made by the Chicago City Railway Company and the Joseph Stockton Company, both of which were overruled and exceptions were taken thereto by the said defendants separately and respectively. So, also, with motions in arrest of judgment. The action of the trial court in these rulings is assigned for error, respectively, by the defendants against whom they were made.

By stipulation of the parties a single bill of exceptions reciting the evidence and matters in the conduct of the trial was presented and allowed by the trial judge, it being agreed that no recital of said bill of exceptions in favor of one defendant and against the interest of the other should, merely because it is embodied in the bill of exceptions tendered by that defendant against which the recital is adverse, be construed against said defendant, but that such bill of exceptions should be considered as having the same effect as if each defendant had filed a separate bill containing all the evidence and embodying only its own exceptions.

WILLIAM J. HYNES, JAMES W. DUNCAN and C. LEROY BROWN, for appellant; MASON B. STARRING, of counsel.

JOHN J. SWENIE and M. R. HARRIS, for appellee.

F. J. CANTY and R. W. IRWIN, for Joseph Stockton Company.

MR. JUSTICE BROWN delivered the opinion of the court.

The two appeals heard together involve a thoroughly triangular contest. The appellants agree in very little, but each is entirely satisfied that if either appellant is liable,

it is the other; while the appellee, having secured a judgment against both, is confident that both are guilty.

Many alleged errors have been assigned and argued, among the most serious of which are actions of the court taken at the instance of or in accordance with the contentions of one of the co-defendants, appellants here. These could not of course be taken advantage of by the litigant at whose instance they were made, but they are, if injurious, proper subjects for complaint by the defendant whom they wrong.

As the judgment is a unit and must be either affirmed or reversed as such (*Street R. R. Co. v. Morrison Co.*, 160 Ill., 288-295), we shall discuss in this opinion the whole case and the errors alleged by each party defendant below, and confine ourselves in rendering judgment in the other appeal to referring to this opinion for the reasons therefor.

Several of the errors alleged and argued by the Chicago City Railway Co. relate to the deposition of W. B. Affleck, which was taken in Philadelphia at the instance of the defendant, the Joseph Stockton Company, and first opened and filed May 2, 1904. Thereafter it was withdrawn from the files by the Joseph Stockton Company (leave being given it at its own instance) and forwarded to the Commissioner in Philadelphia who took it. By him it was again sent *after alteration* to the Clerk of the Superior Court and re-opened and filed, and was read at the trial by the Joseph Stockton Company over the objections of the City Railway Company. The City Railway Company, immediately after its first opening, moved to suppress the deposition for technical defects in the form of oath or certificate thereof and in the commission, and for the refusal of the witness to answer fully questions of the defendant the Chicago City Railway Company. The motion was denied.* It is unnecessary to decide whether or not this was erroneously done, for the subsequent proceedings were so plainly irregular that we cannot overlook them.

In the first place we think the trial court acted irregu-

larly and erroneously in ordering or allowing one of the parties, over the objection of another, to withdraw the deposition already opened and filed and send it by private communication to the Commissioner. If there were to be any correction of the deposition in any respect, even in the certificate, we think that all the parties to the litigation whom that deposition might affect had the right to know when it was to be made and where. We have examined several cases, such as *Leatherberry v. Radcliffe*, 5 Cranch, 550; *Conger v. Cotton*, 37 Arkansas, 286; *Bewley v. Ottinger*, 48 Tennessee, 354; *Borders v. Barber*, 81 Mo., 636; *Price v. Horton*, 4 Texas Civ. Appeals, 526; *Wallace v. Byers*, 14 Texas Civil Appeals, 574, in which the certificate of the officer who took the depositions was amended by leave of court after the depositions had been first opened and published, and where a motion afterward to suppress was held rightly denied. But in some of these cases objection was held to have been waived by not being made on the application for withdrawal of the depositions for correction, and in the others the course adopted to secure the correction was very different from that followed here.

Thus in *Conger v. Cotton*, 37 Arkansas, 286, the officer appeared in open court and there amended his return. This was the case also in *Bewley v. Ottinger*, 48 Tenn., 354. In *Borders v. Barber*, 81 Mo., 636, the court directed the clerk of the court to return the deposition to the officer for the correction of the certificate merely by annexing a seal.

In *Wallace v. Byers*, 14 Texas Civil Appeals, 574, the exact course pursued is not mentioned by the court, but the learned judge says that "The amendment of these depositions was had in each instance upon due notice and with the permission of the court and with such 'regulations and safeguards' as indicate that the integrity of the answers was preserved." It would seem, therefore, that some other method of securing the object desired was there used than in the case at bar, for the phrase "regulations and safeguards" is evidently quoted from an antecedent case of the Supreme Court of Texas, *Creager v. Douglass*, 77 Texas,

484, where it was held that a deposition should have been suppressed which had been taken from the files once without the authority and a second time with the authority of the court, to have the certificate amended. In that case the court said: "No doubt all certificates and endorsements connected with the return of a deposition may be amended in the presence of the court upon notice to the parties interested, and we can see no sufficient reason why the court should not have the power to direct, under proper regulations and safeguards, its being done elsewhere, but it should not be done without the permission of the court.

The statute intends to secure and preserve evidence of the correctness of depositions and of their freedom from being tampered with by the observance of the regulations prescribed, and not by means of an inspection of the deposition or through *ex parte* evidence showing the same things."

The mere entry of an order allowing a party litigant to withdraw a deposition for amendment of the certificate would not seem to add any "regulation or safeguard" to the method employed in this case and found unsatisfactory.

The Supreme Court of Missouri in *Borders v. Barber*, *supra*, said: "This" (i. e. directing the clerk to return the deposition for correction of the certificate) "is a practice not to be too frequently indulged, and the trial court cannot be too cautious and circumspect in guarding it. But all the notary did in this case that was material was to affix his seal. All he did was formal, in no manner affecting the evidence or any valuable right of the defendant." However, in summing up it declares: "The governing principle in such cases seems to be this: If the court is satisfied that the substance of the deposition is in fact that the paper has not been tampered with in any particular to the detriment of the adverse party, it should be admitted."

Following the spirit of this remark of the learned Court in *Missouri*, we might be disposed to regard the amendment of the certificate by the officer in this case, although secured by an irregular and, as we think, erroneous method,

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as no such controlling reason for the suppression of the deposition, as to make the refusal of its suppression reversible error. But the objection to the deposition when it was returned goes further. When the deposition was returned and opened on May 2, 1904, it was signed by W. B. Affleck, the witness. It was certified by the Commissioner that it had been so signed, and was sworn to by the witness April 28, 1904. When it was returned and opened for the second time, on May 9, 1904, it had the same signature and a certificate of the officer (amended in form) to the same effect, viz: that the witness signed and swore to the deposition on April 28, 1904. It therefore appears that any changes in the body of the deposition, in the words of the examiner or of the witness, of which several appear, must have been subsequent to the signature and oath of the witness. In the most favorable view that could be taken, they were made by the Commissioner, presumably from his recollection or from stenographic notes of the transcriber, but all this must be a hypothesis to which there is no certificate, and in any event the material matter is that language to which the witness, after it had been written out in long-hand, subscribed his name and made his oath, was deliberately changed without his consent or knowledge so far as appears, after it had been, by filing and opening, published as his deposition. This cannot be passed over as a trifling or harmless irregularity without breaking down the safeguards which are so carefully put by the law around the taking and offer of depositions as primary evidence.

The changes noted and shown in the bill of exceptions are these:

Interrogatory 49 was changed from: "The place or arrangement of the platform of the freight house?" to "Describe the place or arrangement of the platform of the freight house?"

In interrogatory 75 the word "above" was changed to "upon."

Interrogatory 85 with its answer was originally this:

Q. "Was this question put to you⁶ on that occasion, do you recollect: "That that side of the car all the way through, that the east end, the seats all the way through the car were occupied", and to that question did you answer, "I am not certain of it?" "

A. "I have no recollection of making that answer to that question."

The question was changed to read as follows:

Q. "Was this question put to you on that occasion: 'Don't you recollect that that side of the car all the way through, that the east end of the seats all the way through the car were occupied?' and to that question did you answer, 'I am not certain of it'?" "

In Interrogatory 99 the word "head" was changed to "height."

Before interrogatory 110 was asked, the witness had stated that he had "leaned out of the car, when he saw there was going to be a collision."

Interrogatory 110 and its answer stood originally thus:

Q. "Did you continue to lean out until the time of the vehicles coming together?"

A. "As they came together *I jumped off*, I did just as they came together." The answer was changed to:

A. "As they came together *I ducked in*, I did just as they came together."

In interrogatory 142 the word "Did" was changed to "Do."

It may well be said that these changes, with the exception of the answer to interrogatory 110, could not have been "to the detriment of the adverse party", and that even this alteration, changing the meaning so entirely as it does, can not be shown to have had a material bearing on the case in any way. But this is hardly satisfactory reasoning. Neither in the questions nor the answers thereto can the judgment of the Commissioner be allowed play as to what is or is not material, so as to make permissible such changes as these after signature and oath. If it could,

there would be no assurance that any deposition came to the hands of the clerk of the court as the witness left it.

In the case of the Winooskie Turnpike Company v. Ridley, 8 Vermont, 404, where the magistrate, after the deposition of a witness was taken, read over and sworn to, concluded that he had made a mistake in writing that witness had testified that a certain conversation took place "on the bridge", and changed the words to "at the bridge", the Supreme Court of Vermont reversed a judgment because the deposition had not been suppressed. It said: "Depositions are a species of evidence in suits at law altogether unknown to the common law. * * * They are, moreover, a species of evidence of a most unsatisfactory character and should always be received with the utmost caution. The legislature have guarded them with great care, and the courts have rightly enforced all the safeguards which the legislature has established. The statute requires that they shall be signed by the deponent as well as sworn to. The object of signing is doubtless to make the deponent responsible for the phraseology of the deposition, for by signing he adopts the language as his own. Had the statute required that the magistrate only should sign the paper, the committing the testimony to paper might be considered the act of the magistrate, and the peculiar language used might perhaps be considered as his. In such a case, it might be competent for the magistrate, so long as the paper remained under his control, to correct the phraseology according to his understanding of the purport of the testimony. But under the statute, the language of the deposition must be considered emphatically the language of the witness, and he alone is responsible for its correctness. If then a deposition be altered in a material part after it is signed and sworn to, it is no longer the thing sworn to, and the witness is no longer responsible for it. * * * In short the paper so altered is no longer the testimony of the witness and cannot be regarded as such. * * * The evidence did not consist in the written deposition signed and sworn to by the witness with all the forms and under all the safe-

guards provided by the statute, but in the testimony of third persons as to what the witness testified to before the magistrate.

Another most satisfactory reason for rejecting the evidence is to be found in the extreme danger of suffering the magistrate thus to tamper with the instrument. Every consideration of general expediency, as connected with the elucidation of truth and with safety in the administration of justice, forbids it. To admit this evidence would be unsafe in the particular instance and dangerous in the last degree as a precedent."

The court then discusses the argument of counsel for the appellee that the alteration of "on" to "at" was immaterial, and says that it must be considered material because "on" implied that the bridge was standing and that the witness was on it when the conversation took place, and there was evidence in the case that the bridge was not raised until a few days after the date of the conversation. "If the bridge was not in existence at the time, the circumstance certainly establishes an inaccuracy in the particular of either time or place. How far this might have impaired the credibility of the witness in the minds of the jury, is not for us to determine. It certainly had such a tendency, and if so, it was material, whether in a greater or less degree, is unimportant." The court then proceeds: "*Whether an alteration, in no sense material, as a correction of errors in orthography, or grammatical expression, would vitiate the deposition, is a point not before us, and which we do not decide. But we are all agreed, that an alteration by the magistrate, after the deposition is signed and sworn to, without the assent of the deponent in a particular in any sense material, is fatal to the evidence.*"

We think this language of the Supreme Court of Vermont, while of course not controlling, very pertinent in the case at bar.

To say nothing of the changes in the interrogatories, which might pass perhaps as corrections in grammatical expression, it cannot be said that in any such sense the answer

to the question whether the witness continued to lean out of the car until the collision,—“as they came together I ducked in”—is a correction of “as they came together I jumped off.” It may be said that it is highly improbable that the change affected the jury’s opinion on the credibility or accuracy of the witness, or any reasonable argument that could be made in relation thereto, but the vice of such reasoning is apparent. It makes the court the judge of what effect or want of effect on the mind of jurymen differing statements of fact would have—a manifestly dangerous thing.

We hold that to sustain the court below in overruling the motion to suppress this deposition of Affleck after it had been opened and filed the second time, would be “dangerous in the last degree as a precedent.” As the deposition should have been suppressed, it follows that it was erroneously read in evidence. It was full of matter material to the issues in this case and tending to fix liability on the appellant, the Chicago City Railway Co., and we must reverse the judgment and remand the case upon this ground alone. But as the case will probably be retried, it is proper that we should express ourselves on other questions raised on the appeal. This we shall do, however, with as little elaboration as possible.

Complaint is made by the appellant, the City Railway Co., that the witness Affleck in his deposition refused to answer many material questions propounded to him on cross-examination by that company, and that material answers to questions which he did make were excluded by the trial judge as immaterial. As the deposition of Affleck may be retaken, or he may be produced as a witness at the trial, it is proper for us to say that we think the witness went in his refusals dangerously near to the line which would have rendered it proper to suppress the deposition, and that while we should not reverse the cause for the rulings of the trial judge on the excluded answers, it should be the rule in a retrial that any questions on cross-examination seeking to show the relations between the witness and the party call-

ing him are, on general principles, competent as affecting credibility.

Both appellants argue that the two instructions given at the request of the plaintiffs and numbered 3 and 4, are so erroneous as to require a reversal. They are as follows:

"3. The jury is instructed that if they believe from the evidence that John Schaefer was a passenger on the car of the Chicago City Railway Company, July 2, 1901, and that without fault on his part, and while in the care of the Chicago City Railway Company, as a passenger, was struck and injured in a collision between such car and a truck wagon of the Joseph Stockton Company, through or by the negligence in manner and form as charged in the declaration or some one count thereof, of the operator of either the car of one defendant or the wagon of the other defendant, without fault on the part of the co-defendant, then the plaintiff is entitled to recover against the defendant, if any, guilty of negligence under the evidence, a sum not exceeding fifty thousand dollars, as you may find from the evidence in the case, in compensation for any and all injuries sustained by him, if the jury believe from the evidence the plaintiff sustained injuries by reason of such collision."

"4. The jury is instructed that if they believe from the evidence that John Schaefer, on the 2nd day of July, 1901, was a passenger upon the car of the Chicago City Railway Company, and that without fault of his own he was struck and injured in a collision between a truck wagon of the Joseph Stockton Company through the negligence or want of care of the operators of such truck and street car, in manner and form as charged in the declaration or some one count thereof, then the plaintiff is entitled to recover in this suit against both defendants, and the plaintiff's measure of damages is compensation for all the injuries temporary and permanent sustained by him, if the jury believe from the evidence the plaintiff has sustained such injuries."

Both these instructions are open to serious criticism, be-

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cause they authorize compensation in the damages for *all* injuries sustained by the plaintiff. This was erroneous, it seems to us, in two particulars. There are certain injuries for which damages cannot be recovered in an action like this, and certain other injuries, as the word is generally used at least, for which they cannot be. Of the latter class are, for example, mental suffering and chagrin, not the direct result of physical pain, but caused by bodily defects which are the result of the accident. We think that the cases cited by appellants in their respective briefs on this matter from the Appellate Court reports are in point. *McGinnis v. Berven*, 16 Ill. App., 354; *C. & G. T. Ry. Co. v. Spurney*, 69 Ill. App., 549; *Chicago City Ry. Co. v. Canevin*, 72 Ill. App., 81; *Lake Street R. R. Co. v. Gormley*, 108 Ill. App., 59; *Chicago City Ry. Co. v. Deyo*, Appellate Court of First District, June 3, 1904.

We see, moreover, no escape from the objection urged to these instructions, that the pecuniary loss in earning power during the minority of the plaintiff could not properly be included in the damages assessed, because it would be the loss of the plaintiff's parent and not of the plaintiff. *Western Union Telegraph Co. v. Woods*, 88 Ill. App., 375.

And again we think the third instruction faulty in form, in that it assumes that if the plaintiff was a passenger on the car of the Chicago City Railway Company, he must have been in the care of said company, whereas it was a distinct defense urged by the appellants that the plaintiff had assumed the risk of accident from his exposed position because he had unnecessarily refused to abandon it at the request of the railway company's agent. This theory is recognized by other instructions and should be, we think, in this.

Such serious faults as we have indicated in instructions given in a closely contested case, where the verdict rendered was so large, would have made a new trial, we think, necessary, if there had been no other reason for it.

The appellant, the City Railway Company, complains with urgency of the instruction given to the jury at the re-

quest of its co-defendant, the Stockton Company, and numbered 37. We think that the objections so made to it are well founded. It is as follows:

"37. The court instructs the jury that under the law and evidence of this case, they can find both defendants guilty, or both defendants not guilty, or either one of the defendants guilty and the other defendant not guilty."

The City Railway Company argues that this instruction told the jury that they could render the verdict which they actually did render, against both defendants, irrespective of what they might believe from the evidence. It was, in other words, it is insisted, a substitution of the court's belief or opinion for the jury's and an instruction that the law and the evidence authorized any verdict which the jury saw fit to render. It is quite obvious that the purpose of the instruction was merely to advise the jury of their right to find both defendants guilty if they believed from the evidence those things necessary to charge both defendants under the law as given by the instructions of the court, and so as to one only, while if they did not believe from the evidence that which under the law would make either liable, they could find them both not guilty. Very possibly the jury so understood it when taken in connection with the other instructions. But it is not sufficient even that we should think that the jury probably so understood it, if it is so incorrect that it can on any reasonable ground be held possibly to have misled the jury. It is very doubtful whether we should not have felt obliged to reverse this judgment and remand the case for the giving of this erroneous instruction, even if the error concerning the Affleck deposition had not intervened, and we could have passed over the defects in instructions 3 and 4.

The Joseph Stockton Company as appellant complains of instruction No. 24, given at the instance of its co-defendant, the City Railway Company. It is as follows:

"24. The jury are instructed that by reason of its con-

venience to the public as a carrier of passengers, and because of the inability of its cars to turn out, a street railway company, at points on its line other than street crossings, is invested with the right of way over other vehicles over the portion of streets occupied by its railroad, and it is the duty of drivers of such vehicles to turn out and allow its cars to pass and to use care not to obstruct or delay the same, and if the jury believe from the evidence that the driver of the transfer wagon neglected such duty, then the jury have a right to take into consideration in determining whether or not the defendant, Chicago City Railway Company, was guilty of the negligence charged in the declaration, the fact that the said railway company was invested with the right of way over other vehicles over that portion of the street in question upon which it ran its cars."

Although this instruction could not be complained of by the appellant, the City Railway Co., we will discuss it and such other matters as are alleged to be erroneous and injurious to the Stockton Company in this opinion, which, although filed in the appeal of the railway company, will be referred to as also stating our conclusions in the appeal of the Stockton Company. We think this instruction, under the circumstances of this case, was very likely to mislead the jury, and that it should not have been given. The paramount right of the City Railway Company to the tracks was not in issue in this case and should not have been presented in a manner to the jury which would be likely to have given them the suggestion that it was.

We think the authorities cited by the Stockton Company on this instruction are in point. *West Chicago Street Railway Co. v. Schwartz*, 93 Ill. App., 387; *Kansas City F. S. & M. R. Co. v. Stoner*, 49 Fed. Rep., 209; *Frank v. Metropolitan Street Railway Company*, 86 N. Y. Supp., 1018; *Chicago City Railway Co. v. Lannon*, 212 Ill., 477. Whether or not the giving of this instruction in connection with many others which stated clearly the real issues in the case as against both and each of the defendants would have

been held by us to be reversible error, if no other obstacle to affirmance had been found, it is not necessary for us to decide. It is sufficient for our purpose here to say that this instruction should not be repeated on another trial.

Instruction 25 is also objected to by the Stockton Company. It is as follows:

"25. If the jury believe from the evidence that the wagon with which the car in question came in collision was driven and managed in a careless and unskillful manner, and that such manner of driving said wagon, if it was so driven, was the sole cause of the injury to John Schaefer, now complained of, then the jury must find the defendant, Chicago City Railway Company, not guilty. The court instructs the jury that the Chicago City Railway Company defends this case separately from the other defendant, and if the jury find the other defendant guilty in this case the jury cannot find the Chicago City Railway Company also guilty, unless they believe that the greater weight of the evidence shows that the proximate cause of the injury to Schaefer was negligence in the management and control of the street railway car."

It is argued by the Stockton Company that the first half of the instruction is erroneous, because the declaration does not charge the negligence of the wagon owner to be unskillfulness in driving. We do not think the instruction is open to criticism on this score. The declaration charges that the defendants *respectively* negligently ran, operated and managed their car and wagon so as to cause them to collide, etc., and driving "in a careless and unskillful manner," we think is negligently managing a wagon.

The second half of the instruction is objected to by the Stockton Company on the ground that "it was not true that the jury could find one defendant guilty and the other one not guilty," and that "if either defendant had been successful in proving that it was not guilty of the specific negligence charged to it, then no recovery could be had under

the declaration because there could have only been a joint recovery. This contention of the Stockton Company is in strong contrast with the instruction No. 37, given at its instance, which we have criticised, and no authority is cited for it. We do not agree with it. It would be hard to frame a declaration in this case which did not allow a recovery against either defendant. Certainly the present one does so allow it. The difficulty is rather, under this evidence, to see how a verdict can be sustained against both, and this contention, hereinafter to be again alluded to, is in other portions of the Stockton Company's argument vigorously pressed.

We do not think that instruction 25 is erroneous.

The City Railway Company complains of the following instruction, given at the instance of the Joseph Stockton Company:

"32. The court instructs the jury that in considering the question of whether or not the defendant, The Joseph Stockton Company, by its driver, was negligent in the manner in which the wagon in question was being managed at the time the said plaintiff was injured, as set forth in the plaintiff's declaration herein, or some count thereof, the jury have the right to and they should consider all the circumstances surrounding the place where the alleged injury is said to have been received. They should consider the condition of the street, and the situation of the tracks laid thereon, and having considered all the circumstances and conditions existing at the time, then if they believe from the evidence that the driver of said wagon was not negligent in the manner charged in the declaration or some count thereof, your verdict as to The Joseph Stockton Company, should be not guilty."

We do not think that under the circumstances of this case this instruction is properly subject to the attack made on it by the railway company as unduly emphasizing or selecting for comment certain phases of the testimony. Neither it

nor instructions 36 and 40, complained of on substantially the same grounds, fall fairly within the authorities cited by the railway company.

The City Railway Company offered the following instructions, numbered 1 and 2, which were refused, and their refusal the railway company argues was reversible error.

"1. If you believe from the evidence that a person of ordinary prudence having the same age, experience, intelligence and ability to care for himself that the plaintiff had, would under all the facts and circumstances shown by the evidence in this case, have kept a lookout to the front and side of the car while he was riding upon the footboard, and if you further believe from the evidence that the plaintiff did not keep any lookout to the front or side of the car and that he failed to pay any attention to the condition of the street with reference to whether or not there were any vehicles near the course of the car, then the jury must find the defendant not guilty."

"2. If you believe from the evidence that the car upon which Schaefer was riding contained unoccupied seats before and at the time of the collision in question, and that Schaefer knew or could have known by the exercise of reasonable care on his part that there were such unoccupied seats, and if you further believe from the evidence that Schaefer voluntarily and unnecessarily rode upon such footboard, then you must find the defendant Chicago City Railway Company not guilty."

The first of these proffered instructions we think was clearly properly refused. It made the judge the arbiter of what was contributory negligence, rather than the jury, and singled out one particular matter to which the attention of the jury was alone to be directed in determining it.

The second instruction was a correct statement of the law, in our opinion, so far as it merely involved the proposition that a passenger who rides on the footboard outside the car when it is reasonably practicable for him to take a seat within it, assumes the risk of his position; but we do

not think it was reversible error to refuse it, especially in view of instructions 16, 17, 20, 29 and 31, given at the instance of the railway company. These instructions clearly expressed the law and left to the jury the questions of fact involved in the question of contributory negligence which was raised.

It is assigned as error by both the appellants (but argued only by the City Railway Company) that motions in arrest of judgment by the defendants were overruled by the court. We do not think that this action of the court was in error. The declaration, in our opinion, stated a cause of action with sufficient particularity to meet the requirements of the law as laid down in *Chicago City Railway Company v. Jennings*, 157 Ill., 274, and other cases. It is not now worth our while to discuss whether or not the bill of particulars sought for by the City Railway Company should have been ordered. It is quite evident that on a second trial of the cause the company will not be, even without such a bill of particulars, destitute of notice "of the nature of the claim against it with greater particularity than is required by the rules of pleading."

Various errors in the admission and exclusion of evidence are alleged and argued by the City Railway Company. We think that in a retrial of this case, inquiry into the movements of the plaintiff and his companion on the car should not be confined by the ruling of the court to the precise time of the accident, but that it should be allowed as to a reasonable time preceding. Such movements might well have a bearing on the questions of contributory negligence and the assumed risk of the position.

We think that due latitude on cross-examination would have admitted the questions to Mrs. Lentz and to Skinner inquiring concerning contradictory statements made by them, but we see no error in the exclusion of Mr. Holmes' testimony, which is complained of, nor do we think the hypothetical question to Dr. Loring improper. There was no error in the refusal to exclude the testimony of the physicians as to the tests of plaintiff's eyesight. The questions

to Smith and Chapman concerning giving their addresses to the conductor, although not very material, might properly, we think, have been allowed.

It is manifestly unnecessary for us to discuss the question of the refusal of a continuance.

For the reasons hereinbefore given, the admission of the Affleck deposition in evidence and the giving of instructions 3, 4 and 37, we shall reverse the judgment and remand the case. We do this for errors in the conduct of the trial with less reluctance than we should if the judgment seemed to us more thoroughly in accord with the weight of the evidence.

Motions were made at the close of the plaintiff's evidence and repeated at the close of all the evidence, by the defendants respectively, for instructions to find them respectively not guilty. There was conflicting evidence, and we do not think either of such instructions should have been given.

And as this case is probably to be retried, we do not purpose to discuss the question of the preponderance of the evidence in favor of or against any parties to the controversy. It is not necessary, in view of the conclusion that we have reached, for us to take up the question of the action of the trial court in refusing a new trial on the ground that the verdict was contrary to the evidence, nor to indicate our own view of it, and we do not think it desirable to do so with any particularity. But we think it proper to say that although there may easily be a case of collision of vehicles of this character, resulting in injury to a third party in which both the vehicle owners would be liable, and although there is conflicting evidence in this cause, the tendency of which is to show each of the defendants liable, we do not clearly see how in this case the jury could properly, from the evidence presented, have found both guilty.

We are not inclined to think we should have felt justified in the reversal of the judgment and remanding this case simply on account of the amount of the verdict, but we think it very liberal for the damages proven, and the allusion to the plaintiff's orphanage should of course not have been

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made by counsel. It is not, therefore, wholly to be regretted that the judgment of another jury must be sought on the amount of damages, if any, to be awarded.

Reversed and remanded.

**Frederick W. Blocki, Commissioner of Public Works, v.
Krueger Bros. & Company.**

Gen. No. 12,013.

1. COMMISSIONER OF PUBLIC WORKS—*when should issue house moving permit.* Where a municipal ordinance requires that such a permit shall issue after certain prescribed conditions have been complied with, it is improper, when such conditions have been complied with, for the commissioner to refuse to issue such a permit; and it is not within his power to question the character of the applicant where such applicant has been duly licensed as required by ordinance.

2. FRONTAGE CONSENTS—*when prima facie executed by owners.* Frontage consents required by ordinance as a condition precedent to the granting of a house-moving permit, are, in a *mandamus* proceeding, *prima facie* presumed to have been signed by the owners of the frontage required where by the affidavits of the persons executing the same, accepted by the commissioner, they so appear.

Mandamus proceeding. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed July 3, 1905.

Statement by the Court. The appellee, a corporation, filed in the Circuit Court of Cook county a petition for a *mandamus* to compel the appellant to issue to it a permit to move a frame building. An answer was filed by the appellant to the petition. A demurrer to this answer was sustained. Thereupon the appellant filed an amended answer, to a portion of which the appellee demurred specially as immaterial, irrelevant and impertinent. This demurrer was also sustained, and the issue made by the petition and that part of

the answer not demurred to was submitted to a jury, which found for the petitioner, under an instruction of the court. A motion for a new trial was made and overruled, and judgment was rendered on the verdict awarding a writ of *mandamus*.

From that judgment an appeal has been taken to this court, and there are assigned as errors "the sustaining of the demurrer to the amended answer, the admission of immaterial and incompetent evidence, the refusal of the court to give an instruction offered by the appellant, and the giving by the court of the instruction in behalf of the appellee.

WILLIAM D. BARGE, for appellant; EDGAR BRONSON TOLMAN, Corporation Counsel, of counsel.

SULLIVAN & JARRETT, for appellee; DENIS E. SULLIVAN, of counsel.

MR. JUSTICE BROWN delivered the opinion of the court.

The petition in this case set forth the ordinance of the city of Chicago concerning permits to move buildings through the streets of Chicago. This ordinance provides that any person desiring to move a wooden building shall first obtain the written assent to such removal from persons owning a majority of feet front of lots in the same block in which it is proposed to locate such removed building, and also from a majority of persons owning feet front opposite the proposed location and within one hundred and fifty feet of the same. The ordinance then provides that, "Such person shall also file an affidavit subscribed and sworn to by one or more persons, in the following form as near as may be, viz.:

"And * * * each being duly sworn on oath deposes and says each for himself, that he was present and saw the persons whose names are subscribed to the above petition sign the same, and that each and every one of said persons claimed at the time of said signature that they were the owners of the property placed opposite their respective names

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in the above petition or the attorneys or agents of the owners, with full authority to sign and act for them. Subscribed and sworn to before me this * * * day of * * * A. D. 190 .”

It also provides that no person except a licensed house mover shall remove buildings, and that any person engaging in said occupation must procure a license from the Commissioner of Public Works, and give a bond for \$5,000 with good and sufficient sureties to be approved by said Commissioner that he will pay any damage which may happen to any pavement, street, sidewalk, telegraph pole or wire belonging to the city of Chicago or to any tree, and indemnify the city of Chicago against any liability accruing in consequence of the granting of the license or permits to move buildings.

The ordinance declares that upon the execution of a bond as described and its acceptance by the Commissioner of Public Works, a license shall be issued, but that before removing any building the licensed person shall in each instance obtain a permit to do so from the Commissioner of Public Works and pay a prescribed fee therefor.

“In accordance with” these foregoing provisions, it is provided that “permits to move buildings shall be granted.”

The petition for a *mandamus* after thus setting forth the ordinance, represents that the petitioner is a duly licensed house mover under its provisions, and has duly filed its bond, which has been accepted. It also asserts that the petitioner has many hundred dollars invested in machinery and other devices for moving houses; that it entered into a contract with the owners to remove a frame building from 5407 Normal avenue to 5349 Aberdeen street, and presented to the Commissioner of Public Works an application for leave to remove the building, which application contained the written assent to such removal from the persons owning a majority of the feet front of lots in the same block in which it was proposed to locate such building, and also of a majority of persons owning front feet opposite the proposed location and within 150 feet of the same, and that attached thereto

was an affidavit which stated that deponent was present and saw the persons whose names are subscribed to the petition sign the same, and that each and every one of said parties claimed at the time of said signature that they were at the time of said signature, the owners of the property placed opposite their respective names in the petition, or attorneys or agents with full authority to act.

The petition alleges that the building is now worth over fifty per cent of the first cost, and contains the certificate of the commissioner of buildings of said city, certifying to that fact; that the application was in due form, and that all the provisions of the ordinance had been complied with, and that the same had been O. K.'d, as to all of said requirements by the official in the office of the defendant who has direct charge of the issuing of house moving permits; that petitioner presented the application to defendant, and tendered the fee required by the ordinance and demanded that a permit be issued for the removal of the building, yet the defendant refused and still does refuse to issue the permit.

The defendant seems to have relied principally for a defense to this petition for *mandamus* on the matter to the statement of which in the amended answer a demurrer was sustained, namely, that the petitioner had in moving other houses damaged electric wires belonging to the city and electric wires and other property belonging to others, and then refused to pay for the damage, wherefore the respondent, "in order to protect the lives and property of the citizens has refused and still does refuse any house moving permit to the petitioner," and "will persist in such refusal until he is satisfied that petitioner will comply with the conditions upon which such permits are issued."

The respondent has assigned the action of the court in sustaining the demurrer to this defense as error, but it was plainly right. Neither the previous conduct of the petitioner nor its fitness to have a license is in issue here in any way. The Commissioner of Public Works in the city of Chicago is required by ordinance to issue permits to remove build-

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ings in accordance with certain conditions. One of these conditions is that no person but a licensed house mover shall do the work. The only question that could be raised here as to the character of the petitioner is whether it is such a licensed house mover, and it is admitted that it is. After this defense was disposed of by demurrer, petitioner and respondent were at issue in fact only on the question whether or not petitioner in asking for the permit had complied with the provisions of the ordinance in presenting the assents of adjacent property owners.

The petitioner offered in evidence the application which it made to the Commissioner for the permit. Upon it are the signatures of persons purporting to be the owners of property in the block to which the building was proposed to be moved, and of property in the block opposite and within 150 feet on either side of the proposed location of said building. There also appears on said application, although it is omitted from the abstract, the affidavit of one Arthur Atwood that he was present and saw the said persons sign their names and "that each and every of said parties claimed at the time of such signature that they were the owners of the property placed opposite their respective names in the above petition, or the attorneys or agents of the owners, with full authority to sign and act for them." This is exactly the language set forth in the ordinance for the affidavit required to be filed with the application and assents.

It is alleged in the petition, and it appeared in evidence without contradiction that the clerk in the office of respondent who had direct charge of the issuing of house moving permits, on the application being presented to him in proper hours and in due course of his business and with the offer of a proper fee, acknowledged, and indeed certified by a conventional memorandum on the paper, that it complied with the requirements of the ordinance, but insisted on something additional (permission from certain companies owning wires in the street) which the ordinance did not require, before he would issue the permit.

Counsel for the respondent insist that this is not suffi-

cient; that the duty of the respondent to issue the permit is not shown until by affirmative proof in this cause the ownership of the frontage signed for in the application is demonstrated to be in the signers. "Our contention was and is," is the language of respondent's argument, "that appellee was required to show that those who did assent were then the holders of the title to the lots for which they signed." With this contention we do not agree. It would place a very unreasonable construction on the ordinance. When the ordinance, after providing that the applicant shall procure the written assent of certain owners, proceeds to require the filing with a certain officer of an affidavit in a particular form to the execution of the signatures and the claim of ownership, we think the proper construction of it makes that affidavit at least the *prima facie* evidence of compliance with the precedent condition, and that if the official or his authorized representative accepts and certifies the assents as sufficient in number and character, he cannot thereafter be heard to deny that sufficiency as a reason for not granting the permit.

The cases cited by appellant to show that a city is not bound or estopped in certain cases by the utterances of its officers, are entirely without importance in this appeal.

This action is not against the city. It is an attempt to secure from an official of the city that action which a law adopted by the city requires. It certainly cannot be said that the clerk, Mathews, to whom the defendant Blocki especially and directly entrusted the execution of a certain part of his official duties, could not in the matter of those very duties bind or estop Blocki.

As we read the record it was otherwise proved that the required proportionate amount of frontage in the two blocks involved was signed for, but if this were not true, we do not think that as to amount or ownership the respondent could be heard to repudiate the acknowledgment of his subordinate. It follows, therefore, that we think the trial judge was right in holding that there was no defense shown to the

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petition, in instructing the jury to find for the petitioner, and refusing any instruction asked for by the respondent.

The judgment of the Circuit Court is affirmed.

Affirmed.

Augusta Jackson v. Gustave Adolph Grosser.

Gen. No. 12,019.

1. **TRUST DEED**—*right to postpone lien of, by agreement.* The holders of notes secured by trust deed may, without the consent of the maker thereof, postpone the lien thereof to another and otherwise subsequent lien.

2. **DECREE**—*limit of rule as to duty of party to preserve evidence supporting.* The rule that it is the duty of the party in whose favor a decree granting relief is rendered to preserve the evidence, does not mean that when evidence has been produced and filed and is referred to in the master's report as an exhibit and returned to the court, it is not the duty of the appellant when bringing up a transcript of the record to see to it that such transcript is complete, or at least to make and show some effort to cause it to be so; that is a matter pertaining to the completeness of the record which is the appellant's concern, rather than to the preservation of evidence, which is the appellee's.

Foreclosure proceeding. Appeal from the Superior Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed July 3, 1905.

HARRISON D. PAUL and WILLIAM SCHULZE, for appellant.

WELLS & BLAKELEY, for appellee.

MR. JUSTICE BROWN delivered the opinion of the court.

This is an appeal from a foreclosure decree of the Circuit Court of Cook county ordering the sale of certain real estate in Cook county by a master in chancery, primarily to satisfy an amount (fixed at \$2,896.10) with interest from the date of the decree, found by the decree to be due the appellee, Gustave Adolph Grosser, and also the costs of suit (taxed at \$114).

The decree provides that if after paying all costs the pro-

ceeds of the sale be not sufficient to pay said Gustave Adolph Grosser the sum found due to him, the master shall apply them as far as they will reach to that end and report the deficiency, and that if there be a surplus the master shall bring it into court to abide a further order, all questions as to who is entitled to such surplus being reserved until the coming in of the same. It is by the decree also ordered that the rights and liens in said premises of the defendant August Grosser and the defendant Augusta Jackson as between themselves be reserved for the further consideration and adjudication of the court, without prejudice to the rights and remedies of the complainants in the cause found and provided for in the decree.

The appellant is a judgment creditor of one Arcadius Budda, who when the bill was filed was the record owner of the premises involved, subject to various mortgage liens hereafter to be noted, one of which liens had already gone to a sale and a master's certificate. The appellant held against Budda a judgment recovered in the Circuit Court of Cook county for \$2,133 and costs, and as such judgment creditor she had at the time the bill was filed already redeemed from the sale above alluded to and levied an execution on the interest of Budda in the premises.

On the day following the filing of the original bill in this case (December 3, 1901) the sheriff sold the premises under said execution to the appellant, and by deed dated December 9, 1901, conveyed them to her.

Appellant insists here that the court below erred in entering the decree appealed from, because her rights in the property involved were superior to those of the appellee, Gustave Adolph Grosser, for the payment of whose lien it was ordered sold by said decree; and also urges upon us the reversal of the decree because there is not sufficient evidence preserved in the record to sustain it.

The circumstances out of which her contention springs are these: Robert Grosser and wife made the trust deed foreclosed by this decree to H. A. Haugan as trustee April 8, 1895. It was made to secure two principal notes of the

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same date, one for \$2,500 due five years after date, and one for \$500 due one year after date, with various interest coupons on the \$2,500 note. The notes were both delivered to the State Bank of Chicago for money advanced by or through that bank to the aggregate amount of \$3,000, upon a loan to Robert Grosser. Afterward, on April 20, 1896, to secure another loan from one Louise Grosser, Robert Grosser and wife made another note to the order of Louise Grosser for \$1,004, due on or before five years from date, and a trust deed on the same property to one August Grosser to secure it. Neither principal nor interest being paid for some years on this second mortgage incumbrance, August Grosser, who had become the holder of the note for \$1,004, given to Louise Grosser, as well as the trustee in the trust deed securing it, had a negotiation with the State Bank, by which he purchased the \$500 note, on an agreement with the bank that the lien of said note should be subordinate to that of the \$2,500 note retained by the bank, and that he would pay the interest on the \$2,500 note for two years to come, giving coupons therefor.

There is a question made by the appellant concerning these facts and the evidence showing them, but we have no doubt of their existence.

The object on the part of the bank in making the arrangement was apparently to lessen the amount of their loan and thus increase their security; that of August Grosser to be able to carry his interest in the property without the necessity of raising the full amount of the then existing prior incumbrance of \$3,000, and perhaps to secure some possible advantage as to judgment creditors or otherwise, which a title derived under foreclosure of the first mortgage might have over one under the second. Having purchased the \$500 note, at all events, August Grosser commenced foreclosure proceedings under the directions of the State Bank's solicitors, it being a part of the arrangement that they should have control of the suit. To this suit Robert Grosser and wife, one Steen and wife, Haugan, the trustee in the \$3,000 trust deed, and Lindgren, the successor in trust,

August Grosser, the trustee in the \$1,004 trust deed, and Miller, the successor in said deed named, Le Fever, Brilow, Munson, Schlainvoight, Glattacker, Albertson, Balder and Jones were made parties defendant, the bill alleging as to all these last that they claimed to have some interest in the mortgaged premises as mortgagee, lienor, judgment creditor, tenant or otherwise, but that such interests, if they existed, were subject to and inferior to the rights and lien of August Grosser, the complainant. This suit came to a decree by which it was adjudged that there was due to Grosser on the \$500 note \$605.91, with certain interest and costs, including a solicitor's fee of \$100 and \$1,255.50, with certain interest on the \$1,004 note, and ordered that the premises should be sold to satisfy these amounts, the sale to be made "subject to the continuing lien of the trust deed dated April 8, 1895, for the security of a note for a principal sum of \$2,500 secured thereby, and any other amount that might be due or might thereafter accrue under said trust deed other and in addition to the amount thus found due to the complainant, August Grosser."

Counsel for appellant recite as facts in the cause (although the report of sale and distribution is absent from the transcript) that the master sold the premises under this decree August 26, 1900, that there was a deficiency on the "first mortgage interest" of \$100, and that a receiver was appointed by the court to collect rents and pay the deficiency decree; that this deficiency decree was paid in full by September 6, 1900, and satisfied of record; that on September 10 the receiver was ordered to pay and did pay to August Grosser \$385.44 on account of the \$1,255.50 found due to him on the second mortgage interest.

The time of redemption from this sale would have expired on November 20, 1901. On November 15, 1901, Augusta Jackson, the appellant, as before noted, in pursuance of her rights as a judgment creditor of Budda, who had become the holder of the equity of redemption and against whom she had obtained a judgment on November 4, 1901, redeemed the premises in accordance with the

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statute, by paying the sheriff the amount for which they had been sold, with interest at 6 per cent, amounting in all to \$740.67. Thereupon the sheriff levied her execution on the premises, and as indicated hereinbefore, after the filing of her original bill in this cause, sold and conveyed them to her, she bidding therefor \$745.55, being the amount of the redemption money, interest and costs, and no greater bid being made.

In the cause at bar the master to whom it was referred reported, in substance, the facts heretofore stated and found that said complainant had a valid and subsisting lien on said premises to the extent of \$2,500, and interest thereon from October 8, 1901, secured by the trust deed to Helge A. Haugan, prior, paramount and superior to the right of said Augusta Jackson, and that said indebtedness had not been satisfied by virtue of the filing of the bill to foreclose said trust deed in case general number 207,339, the decree of sale therein, the sale thereunder or the redemption by said Augusta Jackson and the sale by the sheriff of said Cook county to said Augusta Jackson, but on the contrary that said bill of complaint in case No. 207,339 was filed, the decree of sale therein was entered, and the sale thereunder was had subject to the continuing lien of said trust deed to Helge A. Haugan, and that the legal holder and owner of said note for \$2,500 was not a party to said proceedings. But the master also found that at the time of the filing of the bill of complaint herein, no default had been made so far as the complainant herein was concerned in the payment of the indebtedness secured by said trust deed to Haugan, and that there was no breach so far as the complainant herein was concerned of any of the covenants and agreements in said trust deed contained, and therefore that the bill of complaint was prematurely filed, and recommended that it be dismissed at complainant's costs without prejudice.

To this report the complainants (Gustave A. Grosser and the Trustee Haugan) filed objections, and so also did the defendant August Grosser and the defendant Augusta Jackson, respectively, all which objections being overruled

by the master were afterwards ordered by the court to stand as exceptions. On the hearing before the Chancellor the exceptions of the complainants were all sustained, and those of the defendants August Grosser and Augusta Jackson respectively were all overruled, and the decree first above recited and appealed from entered.

The exceptions of the complainants were directed to the findings that there had been no default and that the suit was prematurely brought, and to a finding that in and by the foreclosure sale to August Grosser and the redemption therefrom by Augusta Jackson and the sheriff's deed to Augusta Jackson, the trust deed securing the note for \$1,004 and interest thereon, had been cut off and was not a lien upon said premises, "for the reason that the question determined by the finding is an issue between the defendant August Grosser and Augusta Jackson, and not germane to the issue between the complainant and defendant."

The sustaining of these exceptions is not assigned as error by appellant here, and although it is assigned as error by her that the court did not find that the suit was prematurely brought, the assignment is not argued by her and may be dismissed from consideration. The exceptions of the defendant August Grosser were directed to the same finding concerning the \$1,004 note, and are not in issue in this appeal.

The exceptions of the defendant and appellant Augusta Jackson raise the question as to whether by the foreclosure of the \$500 note by August Grosser, the sale thereunder to August Grosser, the redemption therefrom by Augusta Jackson, and the sheriff's deed to Augusta Jackson, the lien to secure the \$2,500 note was cut off.

The exceptions also allege that the master admitted improper evidence and excluded proper evidence in the hearing before him, and that he should have found that August Grosser, the complainant in the foreclosure of the trust deed for the \$500 note, was also at the time of said foreclosure the owner of the \$2,500 note secured by the same

trust deed, and the assignments of error cover the same matters.

The position that the \$2,500 note at the time of the foreclosure of the \$500 note secured by the same trust deed to Haugan belonged to August Grosser, and should therefore have been included in the suit by him, we do not, as we have before indicated, think is supported by the evidence. There is undoubtedly confusion introduced into the record by some of the testimony, especially that of August Grosser, but we think that the general purport of the testimony and documentary evidence amply warranted the finding of the master and the court to the contrary, and we do not think that a discussion of it is necessary.

The only real question on the merits arises on the legal validity of the arrangement which, like the master and the court below, we find was made between the State Bank and August Grosser, postponing the lien of the \$500 note purchased by Grosser from the bank, to the lien of the \$2,500 note which the bank retained. This arrangement was made without the consent or, so far as appears, the knowledge of the maker of the notes or holder of the equity, and it is insisted by the appellant that it was not competent for the holders of the notes to make it. We do not agree with this contention. The cases cited to sustain it can all be distinguished, and their language is to be construed as applied to the facts of the particular cases. But we deem *Walker v. Dement*, 42 Ill., 272, and *Romberg v. McCormick*, 194 Ill., 205, to be precisely in point as establishing the contrary doctrine, which seems to us also on principle equitable and reasonable. We cannot see how the rights of the maker of the notes or of the holder of the equity are disturbed by such an arrangement between the parties holding acknowledged superior mortgage rights over the property, by their agreement as to priority between themselves.

The appellant as redemptioner from the first foreclosure sale was only subrogated to the rights of August Grosser, and those had been fixed, so far as the \$2,500 note was concerned, by his own contract, and were declared and de-

terminated also by the decree in the first foreclosure. As the assignee of Budda's rights by the sheriff's deed, appellant took his rights as they were derived from his predecessors in title, and they were not affected by a change in priority between notes, which it cannot be denied were both secured by superior claims on the premises.

The appellant vigorously insists that the evidence preserved in the record is insufficient to support the decree, because certain exhibits certified by the master to have been produced before him and returned by him to the court with his report, are not found in the transcript. The contention is not meritorious. As to the principal defect noted—the absence of the \$2,500 note of Robert Grosser—this court, after the filing of the briefs, allowed the filing of a supplementary transcript which contains it. But the absence of any of these exhibits from the transcript would not affect our judgment here under the circumstances of this case. The rule that it is the duty of the party in favor of whom a decree granting relief is rendered to preserve the evidence, does not mean that when evidence has been produced and filed and is referred to in the master's report as an exhibit and returned to court, it is not the duty of an appellant when bringing up a transcript of the record to see to it that such transcript is complete, or at least to make and show some effort to cause it to be so. That is a matter pertaining to the completeness of the record which is the appellant's concern, rather than to the preservation of evidence, which is the appellee's. See *Snell v. DeLand*, 138 Ill., 55, and *Silverman v. Silverman*, 189 Ill., 394, in which case the Supreme Court says of an objection similar to that of appellant here, that it "is too technical to merit serious consideration."

We think there is no other of the appellant's contentions which needs discussion. The decree of the Circuit Court is affirmed.

Affirmed.

J. Henry Kraft v. West Side Brewery Company.

Gen. No. 12,025.

1. CORPORATION—*what within implied powers of.* A brewery company has the implied power to make a loan for the erection of a building in which it is required by contract that only the beer manufactured by such company shall be sold.

Foreclosure proceeding. Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed July 3, 1905.

I. T. GREENACRE, for appellant; ALFRED B. DAVIS, JR., of counsel.

WINSTON, PAYNE & STRAWN, for appellee.

MR. JUSTICE BROWN delivered the opinion of the court.

This is an appeal from a decree of the Superior Court of Cook county ordering a sale of certain premises covered by a trust deed executed and delivered by the appellant and wife to the appellee to secure a certain principal note for \$4,000 and certain interest notes at the rate of 6 per cent per annum, made by appellant to his own order and by him endorsed. The notes were given to the West Side Brewery Company, the appellee, for a loan November 15, 1892. The loan was for the purpose of erecting a building on the premises covered by the trust deed, in connection with a contract made at the time that the appellee would take a lease of the building for five years, and that its beer, the manufacture and sale of which was the business of the corporation, should be exclusively used and sold therein. The building was erected with the funds thus procured, and the lease executed, and the appellant paid interest on the principal note for five years up to the maturity of the last coupon and the principal note, November 15, 1897, and thereafter in 1898 and 1899 paid something more on account of interest, for which he was given credit. The decree found due the amount of the principal note of \$4,000 and of the last in-

terest coupon, and \$300 for solicitor's fees, less \$218, made up of various items of rent credited to appellant and \$100 cash paid on October 3, 1899.

Under these circumstances the contention of appellant that he should now be allowed to avoid payment of either principal or interest or any part thereof, on the ground that the appellee had no power or authority under the law to loan money, does not appeal to our sense of justice. Nevertheless, were such the law we should be obliged so to declare it. But the Supreme Court has emphatically pronounced against such a contention. We think the case of *Central Lumber Co. v. Kelter*, 201 Ill., 503, conclusive on this question. The making of this loan by the West Side Brewery Company under the circumstances disclosed by this record was as fairly within its implied powers as was the execution of the bond by the Central Lumber Company in that.

In *Best Brewing Co. v. Klassen*, 185 Ill., 37, cited by appellant, the court said: "If it had been shown that it" (an appeal bond) "was executed clearly for the purpose of promoting or protecting its own business of brewing or selling beer, etc., that is to say, if the act had been reasonably necessary to accomplish the end for which the corporation was formed, it would have been within the scope of the corporate power."

The other cases cited by appellant can all be distinguished from the case at bar, and do not need discussion by us.

We think this loan was made under a valid contract and in furtherance of the appellee's legitimate business, and that "the plea of *ultra vires* cannot be successfully advanced in it to commit injustice." *Lake Street Elevated R. R. Co. v. Carmichael*, 82 Ill. App., 344.

The decree of the Superior Court is affirmed.

Affirmed.

Whiting Foundry Equipment Company v. L. K. Hirsch.

Gen. No. 12,088.

1. **ARGUMENTS**—*when irregularity in order of, will not reverse.* Irregularity in the order of the arguments to the jury will not reverse unless it appears that injury has resulted.

2. **CONTRACT**—*when cannot be repudiated.* A contract for the delivery of scrap from time to time cannot be repudiated by the purchaser on the ground that the deliveries were not up to contract, where by the course of dealing the seller had from time to time been permitted to substitute scrap conformable to agreement; nor can such repudiation, be predicated upon the previous request theretofore made by the shipper where such request had been denied by the purchaser and the contract continued under.

Action of assumpsit. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed July 3, 1905.

PARKER & HAGAN, for appellant.

GOODRICH, VINCENT & BRADLEY, for appellee; WARREN NICHOLS, of counsel.

MR. JUSTICE BROWN delivered the opinion of the court.

In this case a judgment was rendered in favor of the appellee against appellant in the Circuit Court of Cook county for \$361.50 and costs on the verdict of a jury. From this judgment the appellant, the defendant below, has appealed to this court, assigning as error the improper admission and exclusion of evidence, the giving of erroneous and refusal of proper instructions, the denial of motions for a new trial and in arrest of judgment, the inconsistency of the verdict with the weight of the evidence and the law, and irregularity in the order of argument to the jury.

This last matter was within the discretion of the court, and we should not interfere with the judgment on account of any such irregularity even if it existed, unless it appeared that the appellant had been injured thereby.

The other objections raised to the judgment can be best

considered in connection with a brief discussion of the facts and the merits.

The plaintiff and appellee, Hirsch, was an established dealer in scrap iron. His business involved or included buying scrap iron from such sources, far or near, as he could get it from, and reselling it at a profit, and apparently often, as would be natural, forwarding it to purchasers in the car lots in which it was shipped to him or at his order on his purchase. The defendant and appellant was a foundry company using scrap iron and doing business at Harvey, Illinois. February 27, 1901, the defendant wrote to the plaintiff ordering 350 tons No. 1 R. R. or machinery cast scrap (a term apparently well understood in the scrap iron trade), to be free from certain things evidently common in scrap iron and considered objectionable in such as is bought for foundry purposes. The order concluded: "Delivery to be made in March, April, May, June, July and August, 1901, in equal quantities each month. Price and terms \$13.00 per ton, f. o. b. Harvey, Sixty Days. Ship to us Harvey, Ill., as above." March 1st the plaintiff, Hirsch, acknowledged the receipt of the order and accepted the same as satisfactory, excepting that the price was to be \$13 net ton instead of \$13 a ton. The letter of acknowledgment concludes: "I have inserted the word 'net.'" As to the exact meaning or effect of this change it is not necessary for us to inquire, as no objection was made to the insertion and the plaintiff went ahead under the contract thus made and shipped material as follows: By March 16, 1901, the plaintiff had shipped, presumably from various points, three carloads of scrap containing about 85 tons, to the defendant, who had rejected it all as not up to the quality called for by the contract. But the defendant said nothing then about annulling the contract, and on March 19 received and accepted another carload, containing about 18 tons, and shortly afterward received and accepted about 24 out of 27 tons contained in another car. This 42 tons defendant then notified plaintiff was all it could handle in March. The defendant reminded plaintiff that the scrap was to be

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shipped in equal quantities monthly, and also expressed a hope that no more of the sort of scrap which it had rejected from the 27-ton carload would come, as its handling in the manner required by sorting was too inconvenient. The plaintiff, as far as appears, made no objection to the rejection of the unsatisfactory material, or to substituting other scrap for it. April 1 the defendant received from the plaintiff and accepted two carloads of scrap, aggregating over 50 tons, and at the same time received notice from the plaintiff that another car was on its way. In acknowledging the receipt of this notice, it wrote: "Do not ship any more this month, i. e., in April, because we cannot take care of it." This car, of something over 16 tons load, arrived apparently about April 10 and was accepted. All this scrap, which by agreement of the parties seems to have aggregated 109 tons, was paid for by defendant, and no more was sent by plaintiff or seems to have been desired by defendant before May 20, at which date the defendant wrote to the plaintiff to ship one car of scrap to apply on the order, requesting careful attention to the quality, and suggesting that the price above the market which they were paying should insure good material. On May 20 and again on May 22, a car was shipped, and on May 25 received, but rejected by the defendant. Defendant wrote plaintiff on that day that these carloads were rejected, and added: "We * * * insist that when shipping any more scrap to us, you take some steps to assure yourself that scrap is No. 1 before sending it to us."

We think that the course of dealing to this point, culminating in this letter, left the contract, after the sending of this letter by defendant to plaintiff, in force, no suggestion of cancellation or rescission having been made on account of the quality of the scrap, but the right of rejection on inspection having been exercised by one party and admitted by the other. We think, moreover, that the course of dealing and correspondence is inconsistent with the exercise of any right to cancel or rescind the contract on account of more scrap not having been shipped during the month of

May or after April 10. It is unnecessary, therefore, for us to discuss whether the sending of inferior scrap by the plaintiff on May 20 and 22 would have authorized the rescission of the contract by the defendant on its reception and before the writing of its letter of May 25. Moreover, we think that it is also unnecessary to consider whether the strict enforcement of the contract as to the quantities and time of delivery had not been so far waived by defendant as to prevent a rescission of the contract on that score, even if without further correspondence the plaintiff had neglected to make up the stipulated amount of monthly shipments by sending material of the required grade before June 1,—for on May 27, apparently without receiving or waiting for any answer to its communication of May 25, the defendant refused to go on with the contract or to accept any more scrap under it. It was then, in our opinion, too late for it justifiably to do this on account of the quality of the material received on May 25, even if it would have been so justified before writing the letter of that date, which we much doubt.

The letter of May 27 ran: "In view of the fact that it seems an impossibility for you to furnish material conforming to our specifications, please cancel balance of contract. We feel that this is the only way out of the difficulty. We cannot be constantly bothered with cars coming in here loaded with such material as you ship us, and feel that above is best for both parties. In fact it was your own suggestion. *Please acknowledge receipt of this and do not ship more scrap to us.* Regretting that you could not supply us with desirable iron," etc. We agree with counsel for plaintiff that although couched in polite phrase, this was a peremptory refusal to go on with the contract.

It is urged that as the plaintiff wrote on May 31, that although he had tried before to cancel the contract (apparently between April 10 and May 20), he could not consent then to do so, because he had himself incurred obligations in providing for it, and gave notice of another shipment, the contract was kept alive and must therefore be

proven to have been complied with as to time of delivery before plaintiff can recover for its breach or repudiation. Whatever might have been the force of this suggestion, had the defendant then receded from its letter of May 25, or placed its further repudiation and rejection of the contract upon a different ground, it has, in our opinion, no basis under the circumstances that actually exist, for by letter in reply to this communication of the plaintiff, the defendant simply re-affirmed its determination, as expressed in its letter of May 25, to receive no more scrap of any kind, because material sent had not been in accordance with the specifications. We think this the plain meaning of the reply, and that it placed the repudiation of the contract fairly on the letter of May 25, and as dating from that day. No advantage can therefore be taken of the desire of the plaintiff to keep it alive after that time. Under this view of the matter involved we do not think that *Frost v. Knight*, L. R. Exch. 111, and *Kadish v. Young*, 108 Ill., 170, and still less *Dingley v. Oler*, 117 U. S., 409, state a rule which is applicable to the case at bar, and do consider that *Corney v. Newberry*, 24 Ill., 203, and *Roebbling's Sons Co. v. Lock Stitch Fence Co.*, 130 Ill., 660, and *L. S. Ry. Co. v. Richards*, 152 Ill., 59, contain doctrine declared by the Supreme Court, which shows that to leave the question to the jury under the instructions which were given as to whether the defendant wrongfully and unjustifiably repudiated its contract with the plaintiff by its letter of May 27, was at least as favorable action by the trial court as defendant was entitled to.

It may indeed be said that it would have been difficult for the jury, under instructions 6 and 7, given at plaintiff's request, to have found that defendant was not liable to the plaintiff, if they found that in May, June, July and August, the market price was less than the contract price, and that these instructions in effect were instructions to render a verdict against the defendant. But in the view which we have indicated that we hold, we nevertheless do not see how the instructions could have been properly refused.

Of the three instructions which, although requested by the defendant, were refused, the second could not have been given consistently with the view of the law taken by us and taken also by the trial judge and expressed in instructions 6, 7 and 8. The other two were, in our opinion, sufficiently covered by the third instruction given at the request of the defendant in connection with those given at the request of the plaintiff.

There was plainly evidence in the case, if the jury were at liberty to find the defendant liable at all, justifying the amount at which they placed the damages for the repudiation of the contract. The amount fixed on was evidently the amount of profit which they believed from the varying evidence the plaintiff lost thereby, and there was sufficient basis for it in that evidence.

We see no error in the admission of evidence either as to the market value of scrap at Chicago, and consequently, freight charges being considered, at Harvey, during the continuance of the contract, or as to the method by which the plaintiff obtained or contracted for the scrap which he tendered defendant. If the market price prior to May was not material, its proof was not injurious or reversibly erroneous, and the price in May, June, July and August was plainly admissible on the amount of damages.

Evidence as to the method of conducting the business between plaintiff and defendant was material, as tending to construe the contract. That method involved the way in which the material was obtained and shipped by the plaintiff. It was competent in proving this to show that the sending of material which was properly rejected, was not a wilful or grossly negligent attempted violation of the contract by the plaintiff, but a transaction explicable without such culpability on the part of the plaintiff by the default on the part of his vendors, from whom the material was directly shipped. Such a default of course would furnish no excuse for non-compliance with the contract on plaintiff's part by furnishing the grade of scrap iron required in substitution for that prop-

Whiting Foundry Equipment Co. v. Hirsch.

erly rejected; but it was material to prove, in order to throw light on the question of such wilful violation of his contract or intentional attempt at unfair dealing as might warrant the other party in completely rescinding it.

We think substantial justice has been done in this case, and we find no reversible error in the record. The judgment will therefore be affirmed.

Affirmed.

CASES
DETERMINED IN THE
THIRD DISTRICT
OF THE
APPELLATE COURT OF ILLINOIS,
DURING THE YEAR 1905.

William T. Hunter v. Elia Hunter.

1. **ADULTERY**—*when condoned.* Where the husband knowing of the adulterous conduct of his wife lives and cohabits with her for a period of four years thereafter, he condones the offense.

2. **DESERTION**—*what does not justify.* Desertion by the husband is not justified by a showing that his wife was slovenly, failed to keep her children, her household and her husband's and children's clothing in the shape and manner expected of a wife, was unclean as to her own person and clothing and was lazy and neglectful.

3. **ALIMONY**—*when allowance in gross improper.* It is improper in a separate maintenance proceeding to allow alimony in gross.

4. **ALIMONY**—*when, cannot be made lien.* A court of chancery has no power to make a decree for alimony a lien on personal property.

5. **SOLICITOR'S FEES**—*when allowance of, improper.* The allowance of solicitor's fees in a separate maintenance proceeding is improper where no evidence has been preserved to support the same.

6. **SUPPORT MONEY**—*provision should be made for, in separate maintenance decree.* In a decree for separate maintenance, the provision for the support of the wife and of the children should be treated separately, and both the wife and the children provided for.

Separate maintenance proceeding. Appeal from the Circuit Court of Shelby County; the Hon. TRUMAN E. AMES, Judge, presiding. Heard in this court at the November term, 1904. Affirmed in part and reversed and remanded in part, with directions. Opinion filed June 7, 1905.

WALTER C. HEADEN, for appellant.

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J. K. P. GRIDER and CHAFEE & CHEW, for appellee.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This is a bill by appellee against appellant for separate maintenance. The chancellor before whom the cause was heard in open court, found that the equities were with the complainant; that the defendant had deserted her without any reasonable cause, and that she was living separate and apart from the defendant without fault on her part; and decreed that the defendant pay to the complainant the sum of \$600 in gross, on or before August 1, 1904, to be in full satisfaction of all further liability on the part of defendant to maintain and support complainant; that he pay to her the sum of \$100 as her reasonable solicitor's fee, and all costs of the proceeding; that each of the parties should have the care, custody and control of one of their two children; and that an injunction theretofore granted restraining defendant from selling, secreting or removing any of his personal property "be dissolved as to one-half of the property, or such part thereof as will enable the defendant to comply with the terms of this decree, and upon full compliance with all orders herein," that said injunction be fully discharged and released.

The bill charges that in March, 1903, the defendant wilfully deserted the complainant without any reasonable cause and has since persisted in such desertion; that he was often cruel, unkind and inhuman toward complainant and that most of the time she was compelled by him to assist him in plowing and in other hard manual labor, by reason of which she was compelled often to neglect her family and household duties; that defendant was worth over all indebtedness the sum of \$3,000, and that his annual income was not less than \$400 and that she had no property.

Appellant by his answer expressly denies all the allegations of the bill, and charges that the separation was due to the wicked and adulterous conduct of appellee, on account of which he was compelled to leave his home and to

decline to longer live and cohabit with her as her husband.

The chief ground relied upon for reversal is that there is not sufficient competent evidence in the record to sustain the material averments of the bill.

The evidence shows that the parties were married in February, 1894, appellee being at the time 17 and appellant 29 years of age; that they have had two children both of whom are living; that since their marriage they have lived as tenants, upon six different farms; that in March, 1903, appellant left appellee, taking with him their oldest child, since which time he has refused and neglected to contribute anything to the support of her or their younger child.

The evidence offered by appellee tends to prove that during the time that they lived together, appellant failed and refused to provide appellee with sufficient suitable and comfortable clothing or to furnish sufficient household furniture for the use of his family; that the dwelling house upon the farm which they had occupied at the time of their separation, was old and in a bad state of repair; that while they were living together appellant compelled appellee to labor in the fields, to plow, harrow, shuck corn, chop wood, feed the stock, milk a large number of cows and to perform various other kinds of manual labor. That he frequently cursed and abused her in order to compel her to do such work.

The evidence offered by appellant tends to show that appellee was not a good house-keeper; that she failed to keep clean the house, the bed-clothing, or the children and their clothing, or even her own person or clothing; that she neglected her household duties, and failed to prepare the meals at proper and seasonable hours, that she had good and ample clothing, and that appellant provided sufficient supplies of all kinds for the household and family.

The statute entitled "Husband and Wife" (R. S. 1903, page 1039) provides "That married women, who, without their fault, now live or hereafter may live, separate and apart from their husbands, may have their remedy in equity * * * for a reasonable support and maintenance, while

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they so live, or have so lived, separate and apart," etc.

Appellant admits that he left appellee voluntarily, and has since refused to live or cohabit with her. It is not denied that she was at all times willing and anxious to live with him. The facts are similar to those involved in *Bartlow v. Bartlow*, 114 App., 604, where this court said: "The question is: Is the complainant living separate and apart from her husband without her fault? Otherwise put, the question is: Did the defendant desert his wife wilfully, and without any reasonable cause? There is no question that he left her wilfully, that is, knowingly and with the intent to remain absent, so that the material inquiry is: Did he desert her without reasonable cause? Ordinarily in suits under the statute providing for separate maintenance, the wife leaves the husband, and the burden is cast upon her of showing that she had reasonable ground for leaving him. In this case the husband leaves the wife, and while the burden is still upon her to show that she is living separate and apart from her husband without her fault, yet it is of a negative character. The most that she can be expected to show in the first instance is that she reasonably performed her duty as a wife, and then the burden is cast upon the husband to show that he had reasonable ground to leave her; and upon the whole case presented the question is: Is the wife living separate and apart from her husband without her fault?"

While the proof indicates that appellee was far from being an ideal housekeeper; that she was slovenly and failed to keep either her children, her household and household linen, or the clothing of her husband and children, in the shape and manner expected of a wife, mother and housewife; that she was unclean as to her own person and clothing, and that she was lazy and neglectful in the performance of her household duties,—these facts of themselves were far from sufficient to warrant, excuse, or justify appellant in deserting her and their child and in failing to provide for them. When appellant by his marriage vows took her for "better or for worse" it may be said that, to this ex-

tent at least, he "assumed the risk." It follows that if his desertion of appellee was through her fault, it must have been because of her alleged improper conduct with other men.

Upon this question the evidence is substantially as follows: Appellant testifies that during the month of either June or July, 1899, he caught appellee in *flagrante delicto* with one Sexson, a farm hand in his employ. Sexson testifies that he had sexual intercourse with her at about that time. The conduct of appellant, immediately following the discovery of his wife's glaring infidelity, as detailed by him, was so unusual, if not improbable, as to weaken his credibility. There was evidence tending to impeach the veracity of Sexson, and his story as it appears in the record, we think, sufficiently warrants the conclusion that he was not only unprincipled and degraded, but unworthy of belief as well. If it be conceded, however, that appellee was guilty of adultery with Sexson, the offense was committed nearly four years prior to the separation. Appellant admits that during the intervening period he lived and cohabited with appellee as her husband. The offense was thereby condoned. *Davis v. Davis*, 19 Ill., 334. Such cohabitation, after appellant had learned of appellee's adultery, was, in effect, a forgiveness of the offense, upon condition that it should not be repeated. *Sharp v. Sharp*, 116 Ill., 509. The only evidence tending to show a repetition thereof, was that relating to the conduct and relations of appellee with one Dr. Humphreys. In support of his charge of adultery by appellee with Humphreys, appellant testifies, that immediately prior to his desertion of her, appellee, upon being charged by him therewith, confessed that she had been guilty of adultery, not only with Sexson, but with Humphreys and other men as well. Mary Bumgardner, a niece of appellant, testified that appellee told her that, "Dr. Humphreys had hugged and squeezed her," and that a married woman had a right to permit men other than her husband to do so. A letter written by appellee to her sister on November 9, 1901, which was intercepted and retained by appellant,

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was introduced in evidence. We will not quote from, nor refer to the same, further than to say that its contents, general tone, style and character clearly indicate that appellee is not only illiterate, uneducated and intellectually weak, but that she is also, because of the lack of proper moral training, and her other deficiencies, utterly devoid of that sense of propriety and decency which ordinarily governs and controls a pure and virtuous wife and mother. We think, however, that the supremely silly and boastful character of the statements appearing in the letter, indicate the overweening vanity of the writer and her desire for attention and flattery, rather than a vicious and lewd disposition.

Appellee testifies, that appellant left her and the children the first part of March, 1903, telling her that he was going to take her to her father's house until he got another place; that two days thereafter her father came and took her to his home; that he returned in two or three days and took the oldest child away; that he again said he was going house-keeping again when he got another place; that he called upon her at intervals until January, 1904; that at the time he left her he made no charges against her, nor did he state that he was going to leave her permanently, and that she had no knowledge that such was his intention. She denies that she ever committed adultery with Sexson, Humphreys or any one else; or that she ever admitted to appellant that she had done so, or that she made the statements testified to by Mary Bumgardner. She admits having written the letter referred to, but says that she did it "for fun." Dr. Humphreys testifies, that appellee several times called at his office for treatment and had medicines. He was then asked, what took place on such occasions; whereupon counsel for appellant objected to the question upon the ground that the testimony proposed to be offered was not in rebuttal and the court improperly sustained the objection. The contents of the letter to the sister are manifestly insufficient to establish the charge of adultery with Dr. Humphreys. Had Dr. Humphreys been permitted to tes-

tify upon the question, it is fair to presume he would have denied that any improper relations existed. Furthermore the statements of counsel for appellant during the colloquy between court and counsel at the time the ruling was made, indicate clearly that the charge of adultery with Humphreys was not seriously urged. It is not contended, in argument, that the letter tended to prove anything further than that the writer was not a pure and virtuous woman. Aside from appellee's alleged confession, there is no evidence which would have warranted the Chancellor in finding that the offense alleged to have been committed with Sexson, was revived by a repetition thereof with others. The contention as to whether or not the alleged confession was actually made depends almost entirely upon the respective credibility of appellant and appellee, one of whom was clearly guilty of perjury. The chancellor, who saw and heard the witnesses testify and observed their manner while on the stand, is better qualified than we are, to judge of the weight to be given to their testimony. "In chancery cases, where the evidence is conflicting and heard in open court the error in finding as to fact should be clear and palpable to authorize a reversal." *Elmstedt v. Nicholson*, 186 Ill., 580.

It is further contended that it was error to render a decree for \$600 in gross. We think there is merit in such contention. While in cases of absolute divorce alimony is occasionally decreed to be paid in gross, such order is invariably made upon condition that it is to be in full satisfaction of all future claims for support. Where the bonds of matrimony are perpetually severed and the parties are henceforth as utter strangers, or where other special reasons exist therefor, it may be desirable and proper that such order be made. The practice, however, should not pertain in suits for separate maintenance. The reasons are obvious. Notwithstanding the decree of separation, the marital relations still exist and will continue, in the absence of a subsequent decree of absolute divorce, until the death of one of the parties. The sole effect of the decree

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is to permit the wife to live apart from her husband without forfeiting her right to be supported by him. The duty of the husband to support his wife continues as it was prior to the separation, the only difference being that he is compelled by law to pay her a determined fixed amount for that purpose. In all other respects the rights and duties of the parties remain unchanged. If a wife, after receiving a gross sum for her future support, should through theft, sickness or other misfortune, lose, or be compelled to expend, or should even squander the same, the result would often be to impose the burden of her support upon the public. If, in that event her husband is no longer liable for her support, the consideration of public policy alone would render such a decree as that in question, improper. On the other hand, to compel the husband to further contribute to her support, would be unjust and inequitable. Again, if at any time subsequent to a decree for separate maintenance the wife should determine to return to and live with her husband, which she would clearly have a right to do at any time, he would be bound in law to support her, notwithstanding he may have already paid to her a large sum in gross for her future support. We are satisfied that such gross allowance is manifestly not within the intendment of the statute and that in so far as the decree provides therefor, it is erroneous. The decree is further erroneous and improper for the reason that it continues in force the injunction theretofore granted, as to one-half of the personal property of appellant, or such portion thereof as would enable him to comply with the terms of the decree, until such time as he had done so. It does not appear that he owned any real estate. No specific one-half or other portion thereof, being in any way indicated, the effect of the injunction is to make the decree a lien upon all the personal property of appellant.

In *Griswold v. Griswold*, 111 Ill. App., 269, we held that a court of equity has no power to make a decree for alimony, a lien on personal property, and further, that it was of doubtful propriety for a court of equity permanently to enjoin a

husband from selling or disposing of his property. As is there said: "It cannot be presumed that the appellant will pauperize himself to avoid the payment of a reasonable alimony to his wife, and we think the legitimate powers of a court of equity are amply sufficient to protect her."

No evidence is preserved in the record upon which the allowance of the sum of \$100 to appellee, as her reasonable solicitor's fee, can be predicated, and the decree to that extent was improper. In *Metheny v. Bohn*, 164 Ill., 498, in considering the propriety of a decree in a partition suit which allowed a fee to the complainant's solicitors, the court said: "The rule that the evidence to sustain an allowance of this character must be preserved in the record has been repeatedly stated by this court. It was established as a rule in *Goodwillie v. Millimann*, 56 Ill., 523, where it was said (p. 527): 'As a rule of practice, the evidence upon which such an allowance is made should be preserved in the record. Where such large sums are allowed and the rights of litigants are likely to be so materially affected they should not be deprived of having a decree reviewed in an appellate court.' And this rule has prevailed whenever the question has arisen since that time, whether in suits for partition or on the dissolution of an injunction or otherwise. * * * 'In fixing the amount of a reasonable fee, the examination should be directed to what is customary for such legal services where contracts have been made with persons competent to contract, and not what is reasonable, just and proper for the solicitor in the particular case. The inquiry should be, not what an attorney thinks is reasonable, but what is the usual charge.' * * * When the question is considered in an appellate court, although it is one about which the court is well qualified to form an opinion and upon which it will exercise an independent judgment, the evidence is necessary to a proper review of the allowance, for the purpose of showing what the ordinary and usual charges of solicitors for like services are in the court where the allowance was made, in cases where such fees are the subject of contract between solicitor and client."

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In *Jones v. Jones*, 111 App., 396, we declined to reverse a decree for divorce which allowed the defendant the sum of \$25 as her reasonable solicitor's fees, notwithstanding no evidence was preserved in the record of the value of the services of such solicitor. The sum there allowed was so small as to be fairly considered nominal. It was clear from the record, that any less sum would have been grossly inadequate and the decree was accordingly affirmed. While in the present case we are able to determine, to some degree, the amount and character of the services performed, we are unadvised as to the ordinary and usual charges of solicitors for like services in the trial court, and believe that appellant should be permitted to have the decree, in this respect, reviewed in this court.

The decree is further defective in that it makes no provision for the support of the child, Harry, whose care, custody, control and education is awarded to complainant. Under the Divorce Act, which applies equally to the proceedings of this character, alimony for the maintenance of the wife and support money for the benefit of a child or children, are deemed separate and distinct, and notwithstanding the wife may have accepted a gross sum in discharge of all her claim for alimony, she may thereafter, if the custody of a child or children of such marriage has been committed to her, apply for an allowance for its or their support and education.. *Konitzer v. Konitzer*, 112 App., 326.

In so far as it finds that complainant is living separate and apart from the defendant without her fault, the decree is warranted by the evidence, and is affirmed; but for the errors indicated, it will be reversed and remanded with directions to the Circuit Court to dissolve the injunction; enter a decree requiring the defendant to pay to complainant in monthly installments beginning August 1, 1904, a reasonable sum for the support and maintenance of herself and child, Harry; and further, that he pay to complainant as fees for the legal services rendered by her solicitor, such sum as is customarily paid in said court for legal services

of like extent and character. The accumulated amounts due to complainant for the support of herself and child to be paid within 30 days from the entry of such decree.

Decree affirmed in part and reversed and remanded in part with directions.

The Wabash Railroad Company v. Charles Jones.

1. CONTRIBUTORY NEGLIGENCE—*when question as to whether minor guilty of, for jury.* Where a minor is above the age of seven years, no presumption prevails in favor of the exercise of ordinary care, and it is for the jury to determine, not from the minor's age alone but also from his intelligence, experience and ability to understand and comprehend danger and to take care of himself, whether he was guilty of contributory negligence.

2. ORDINARY CARE—*when instruction as to, with respect to minor, erroneous.* An instruction as follows: "The court instructs the jury that a child is not required by law to exercise the same degree of care and caution to avoid injury as is a person of mature years, and that a child is only held to the exercise of such degree of care and caution as children of his age, capacity and intelligence are capable of exercising,"—*held, erroneous.*

Action on the case for personal injuries. Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the November term, 1904. Reversed and remanded. Opinion filed June 7, 1905.

C. N. TRAVOUS, for appellant.

STEVENS & STEVENS, for appellee.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an action on the case. The plaintiff recovered a judgment for \$5,000, to reverse which the defendant appeals. The original declaration was filed August 25, 1892, and contained three counts, each alleging that plaintiff, an

infant under nine years of age, and, therefore, incapable of using due care and diligence for his own safety, was run over by one of defendant's trains at Riverton, Illinois, on December 31, 1891, while walking upon and along defendant's railroad track. The first count charges that plaintiff was upon the track with defendant's permission, and in plain view of the engineer, who carelessly ran over him; the second count charged that he was in plain view of the engineer and fireman, who recklessly and wantonly ran over him, without giving any notice, and the third count charged that he was in plain view of the engineer within the village limits, and the train was suddenly started, without notice, and recklessly and wantonly driven over him. A trial of the case in the year 1893 resulted in a judgment for the plaintiff, which was affirmed in the Appellate Court (53 App., 125), but on further appeal to the Supreme Court was reversed and the cause remanded (163 Ill., 167). On December 12, 1903, an amended declaration was filed, which charged, in substance, that defendant's servants stopped the train at its station in Riverton, and it thereupon became its duty not to start the train without ringing a bell or sounding a whistle a reasonable time before doing so; that not regarding this duty, and while plaintiff, who was "then and there an infant under nine years of age, and incapable, from his tender years, of using due care and caution for his own safety, was then and there walking along and upon the crossing at said intersection of the railroad with said public highway known as "Fifth Street," defendant's servants negligently started the train at the station without ringing a bell or sounding a whistle, contrary to the statute, by means whereof the train ran over plaintiff "then and there on said crossing as aforesaid," thereby inflicting the injuries complained of. Upon the case being called for trial plaintiff, who was then an adult, made the necessary amendment to his declaration and thereafter prosecuted the suit in his own name.

The original declaration averred and the evidence adduced by appellee on the former trial tended to show, that

he was injured while upon the track or right of way of appellant, and not at the intersection of a street crossing therewith. He was therefore held by the Supreme Court, upon the former appeal, to have been a trespasser. The amended declaration avers that the injury occurred at the intersection of the railroad track with a public highway. Upon the second trial appellee testified to that effect, and was corroborated by several witnesses who were not called upon the former trial.

As the judgment must be reversed for the reason hereafter stated, it will be unnecessary for us to detail the general facts appearing in evidence, the principal of which are recited in the former opinion of this court; nor shall we discuss or weigh the evidence generally, further than to say that the abandonment by appellee of the theory upon which his right of recovery was originally predicated, and the adoption of one radically different, together with the attempt to establish in support thereof facts inconsistent with those averred in the original declaration—and this after the lapse of a decade, during which the recollection of witnesses necessarily has become less vivid, and imperfect—tends to cast a doubt upon the righteousness or propriety of the verdict.

The question as to whether or not appellee was, at the time he was injured, in the exercise of due care, was upon both trials earnestly contested. Appellee states upon his cross-examination, that at the time he was injured, he was familiar with appellant's tracks and grounds and the operation of its trains; that he was in the habit of riding upon trains and had frequently alighted at the Riverton depot from the same train that injured him; that he had often taken the route being pursued by him when injured, in going to and from his home; that he knew that the engine was taking coal, which would require but a short time, and that it would then immediately follow him; that he further knew that it was dangerous to walk upon the track in question in front of the train, as it was likely to start any moment. He further states that immediately prior to the time

of the accident he "was thinking that if the train came along and hit him it would hurt him."

It is apparent, in view of his admissions above detailed, that whether appellee, when injured, was exercising that degree of care for his own safety imposed upon him by law, is a matter of grave doubt. The question was vital and possibly controlling, and under the circumstances primarily one for the determination of the jury. That they should have been accurately and perspicuously instructed by the court as to what constituted due care on the part of appellee was therefore unusually essential and important.

It has been definitely settled in this state that a child under the age of seven years, is presumed, as a matter of law, to be incapable of exercising ordinary care, and therefore not to be chargeable with contributory negligence; but beyond that age no such presumption prevails. *Metal Co. v. Weber*, 196 Ill., 526; *R. Co. v. Tuohy*, 196 Ill., 410; *R. Co. v. Jernigan*, 198 Ill., 297.

Inasmuch as appellee was above the age of seven years, the question as to whether he was guilty of contributory negligence was to be determined by the jury, not from his age alone, but also from his intelligence, experience, and ability to understand and comprehend danger, and to care for himself. *Metal Co. v. Weber*; *R. Co. v. Tuohy*; *R. Co. v. Jernigan*, *supra*.

In determining the question it was the duty of the jury to take into consideration the age, capacity and experience of appellee, together with the circumstances surrounding him at and just prior to the accident, as shown by the proof, and from these facts determine whether he acted with the care and caution for his own safety that one of his age, capacity and experience ordinarily would have exercised under similar circumstances.

The second instruction read to the jury at the request of appellee, was as follows:

"The court instructs the jury that a child is not required by law to exercise the same degree of care and caution to

avoid injury as is a person of mature years, and that a child is only held to the exercise of such degree of care and caution as children of his age, capacity and intelligence are capable of exercising."

The instruction was inaccurate and, under the facts in this case, seriously misleading. While it cannot be said as a general rule that all infants above the age of seven years are required to exercise the same degree of care as an adult, such an one is, as we have said, required to exercise such degree of care as a person of like age, intelligence, experience and capacity for understanding and avoiding the danger might reasonably be expected to exercise under similar circumstances and surroundings, and if he possesses the capacity of an adult the law requires him to exercise the same degree of care and prudence as though he were an adult. The jury may reasonably have inferred from the instruction that a child is *never* required to exercise the same degree of care as an adult. Appellee, as the evidence tends to show, was born and reared adjoining a railroad station and in the habit of riding upon railroad trains and familiar with the operation and usual movements of the train which injured him, and may, therefore, have appreciated the danger of remaining on the track, as fully as a mature person of less actual knowledge and experience. The instruction was especially misleading in view of the averment of the declaration that plaintiff was incapable of exercising care because of his "tender years." If the law required of appellee the use of less care than a grown person, solely for the reason he was but nine years old, then such averment was established by mere proof of his age and could not be overcome. In the abstract form in which it was given the instruction may well have been taken by the jury as directory rather than advisory, and we are not satisfied that the error was cured by the instruction upon the subject at the request of appellant. The judgment must be reversed and the cause remanded.

Reversed and remanded.

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Joseph Cunningham v. Daniel Dougherty, administrator.

1. **FRAUDULENT CONCEALMENT**—*what essential to take case out of Statute of Limitations.* A fraudulent concealment necessary to take a case out of the Statute of Limitations must be founded upon some affirmative acts or proof of some act of negligence so gross as to be equivalent to intentional fraud.

2. **MISDESCRIPTION**—*when cannot be taken advantage of, contained in conveyance of land.* A misdescription by which an administratrix sought to convey land pursuant to a proceeding to subject the same to sale for the purpose of paying the debts of the decedent, cannot be taken advantage of by an heir of the deceased owner.

Contest in court of probate. Appeal from the Circuit Court of Calloun County; the Hon. THOMAS N. MEHAN, Judge, presiding. Heard in this court at the November term, 1903. Affirmed. Opinion filed June 7, 1905.

CHARLES J. MCCAULEY and THOMAS F. FERNS, for appellant.

FRANK A. WHITESIDE, for appellee.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This is a claim for \$5,759.06 filed by appellant against the estate of Ann Cunningham, deceased, of which appellee is administrator. The claim was originally heard by the County Court and disallowed. The plaintiff then appealed to the Circuit Court, where upon the verdict of a jury, it was again disallowed, and judgment rendered against plaintiff for costs, to reverse which he appeals to this court.

The following facts are established by the evidence: By the death of their father, in 1876, George Cunningham and John Cunningham, who were brothers, became seized in fee of 140 acres of land in section 20, Township 13, South, Range 1, west, in Calhoun county, Illinois, being the east half of said section. In 1879, after they had become of age, they divided said tract, John taking the west 70 acres, hereinafter designated as tracts "A" and "B," and George taking the east 70 acres, and made to each other deeds of conveyance there-

for. On September 11, 1883, George died intestate, seized in fee of said east 70 acres, and other lands, and leaving him surviving, Mary Cunningham, his widow, and Joseph, appellant, his child and only heir at law. His mother, Ann Cunningham, was appointed administratrix of his estate and in course of her administration petitioned the County Court for an order to sell real estate to pay debts. In the petition said east 70 acres was incorrectly described as "the East end of the N. E. one-quarter of Sec. 20, T. 13, S., R. 1, West, containing 70 acres." The same error occurred in the decree of sale and in the report of commissioners by which about 30 acres of said tract were assigned to the mother of appellant as her homestead and dower. At the sale on July 14, 1883, about 40 acres, being a part of the east 70 acres, and hereinafter designated as tract "C," was sold for \$2,000 to John Cunningham. In the report of sale, which was duly approved by the County Court, the tract was correctly described by proper metes and bounds. The administratrix duly charged herself with the proceeds of the sale, and thereafter under the order and direction of the County Court, devoted the same to the payment of the debts of the estate, and costs of administration, except the sum of \$313.13, which on final settlement, she distributed to appellant and his mother as heirs of her intestate.

On June 16, 1886, after she had fully settled the estate of George, Ann Cunningham purchased from her surviving son, John, tracts "A" and "B" which he had acquired in the division of his brother George, together with tract "C," which he had purchased at the administratrix's sale. In writing the deed the scrivener described the said tracts as "the East part of the N. E. $\frac{1}{4}$ Sec. 20, containing 40 acres, also 70 acres, being the north part of the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of Sec. 20, both of said tracts being in said Township 13 South, in Range 1 West of the 4th Principal Meridian in Calhoun County, Ill." In 1892, John died intestate, unmarried and without issue, leaving him surviving as his only heirs at law, the said Ann Cunningham, his mother, and appellant, his nephew. Ann Cunningham died on the 27th day

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of March, 1900, leaving a last will and testament, by which she devised to appellant (who had reached the age of 21 years on the 4th day of May, 1898) a large body of land including said tracts "A" and "B" and "C," bought by her from John and intended by him to be conveyed to her by his deed. Appellant admits that he immediately took and has ever since retained possession of the two tracts under said will.

By his claim, as amended, appellant, as tenant in common, seeks to recover one-third of the proceeds of certain rents alleged to have been collected by Ann Cunningham upon said tracts "A," "B" and "C," the title to which he claims did not pass to Ann by reason of the imperfect description in the deed, but remained in John at the time of his death; also the entire proceeds of the sale of tracts "C," attempted to be sold by the administratrix as aforesaid.

As to the claims for rents appellee insists that the deed from John passed title to Ann, at least as to all the land except tract "A" and that the evidence entirely failed to show what amount of rent, if any, she collected from that tract. As to the claim for the proceeds of the sale of the real estate, he contends that inasmuch as appellant saw fit to ratify the sale, he could not recover the proceeds thereof, for the reason that they were properly applied, under the order and direction of the County Court, toward the payment of the indebtedness of his father's estate, and the necessary costs and expenses of administration; and further, that any cause of action he may have had for the proceeds of the sale was barred by the Statute of Limitations.

The claim that appellant is entitled to recover from her estate the entire proceeds of the sale of tract "C" is unwarranted in law or equity and is on its face, and in fact, unconscionable. It is not controverted that Mrs. Cunningham in her capacity as administratrix and pursuant to the duties imposed upon her by law, and by virtue of a decree of the County Court, in good faith, attempted to sell such tract for the purpose of realizing funds with which to pay the debts of her husband. Neither is it controverted that such indebted-

ness existed, and that the same could have been made a lien upon such real estate; nor that the proceeds of the sale were devoted to the payment of such indebtedness, nor that the tract in question was the one intended to be sold for that purpose, nor that appellant has affirmed such sale, which was not void but voidable only. It is sought to take advantage of a misdescription of the property and in effect mulct the estate of the administratrix in a sum of money for which she has already accounted, and of which appellant has received the full and direct benefit. We will not analyze or discuss the authorities cited and relied upon by counsel in support of his contention further than to say that we deem them clearly inapplicable. If the sale be treated as utterly void, Mrs. Cunningham having in her official capacity paid the debts of her intestate which were a lien upon his real estate, was, in equity, entitled to be subrogated to the lien of creditors thereon, and could have afterward proceeded, had she desired, to sell the real estate for the purpose of reimbursing herself. Even if the sale was void, the real estate being now the property of appellant, we are of opinion that the County Court, in the exercise of its equitable jurisdiction in the settlement of estates, had power to set-off the amount of indebtedness paid by Mrs. Cunningham, against appellant's claim for the proceeds of the land. Furthermore, if appellant ever had cause of action for the proceeds of the sale, it was barred by the Statute of Limitations. The report of sale was approved on August 13, 1883. Had the appellant at the time been an adult, he would have had five years from that time within which to bring his suit. Rev. Stat., chap. 83, sec. 15. But being at the time a minor, he had a right to bring an action within two years after reaching his majority. *Ibid*, sec. 21. Inasmuch as he reached his majority on May 4, 1898, and the claim for the proceeds of the sale was first presented August 5, 1902, he could only avoid the effect of the statute by proving that the administratrix fraudulently concealed from him the knowledge that he had a cause of action against her (*Ibid*, sec. 22), and the burden of proof was upon him to show such fraudulent concealment.

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It is not contended in argument that she ever made any false statement to him in regard to the matter, nor did anything to prevent him from discovering that he had a cause of action against her. In fact, it does not appear that she ever knew that such existed. A fraudulent concealment necessary to take a case out of the Statute of Limitations, must be founded upon some affirmative acts, or proof of some act of negligence so gross as to be equivalent to intentional fraud. A defendant cannot be guilty of affirmative, fraudulent concealment of a matter of the existence of which he himself had no knowledge. *Wood v. Williams*, 142 Ill., 269. The County Court properly disallowed the claim for the proceeds of the sale, and for any rents accruing from the tract in question.

It is conceded by appellee in argument that the description in the deed from Ann to John is not of itself sufficient to convey tract "A." It is also admitted by appellant that under the rules laid down in *Kemp v. Moir*, 45 App., 491; *Chiniquy v. People*, 78 Ill., 570; *Winslow v. Copper*, 104 Ill., 235; and *Hill v. Blackwelder*, 113 Ill., 294, such description was sufficient to pass title to the north half of tract "B," but it is contended by him that it is insufficient to convey either tract "A" or the south half of tract "B." Be this as it may, the claim is, by its terms, for one-third of the rents collected, and it being impossible for us, or a jury, to determine from the evidence, with any degree of certainty, what amount of rental was actually collected by Ann from that particular real estate no recovery can be had therefor under this record. The burden was upon appellant to prove not only that Ann received rents from such premises, but the actual amount so received as well. This he has failed to do. His claim was therefore properly disallowed *in toto*.

The court erroneously submitted to the jury the question as to the construction of the deeds, which was clearly for the court. It also erred in its rulings upon several instructions. Inasmuch as the verdict returned was the only one warranted by the record, appellant could not have been prejudiced thereby. The judgment is accordingly affirmed.

Affirmed.

Nancy P. Graham v. Thomas C. Grady.

1. **ERRORS ASSIGNED**—*when Appellate Court will not review.* The Appellate Court will not review errors assigned where the appellant failed to take exception to the action of the court in overruling the motion for a new trial.

Action of assumpsit. * Appeal from the Circuit Court of DeWitt County; the Hon. SOLON PHILBRICK, Judge, presiding. Heard in this court at the November term, 1904. Affirmed. Opinion filed June 21, 1905.

GEORGE K. INGHAM, for appellant.

HERRICK & HERRICK, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

Appellee recovered a verdict and judgment against appellant in the Circuit Court of De Witt county for \$175, claimed to be due appellee for services in procuring a purchaser for appellant's land.

Appellant having failed to take an exception to the action of the trial court in overruling her motion for a new trial, this court is precluded from considering and determining the questions presented on this appeal. C., B. & Q. R. R. Co. v. Haselwood, 194 Ill., 69; Call v. The People, 201 Ill., 499.

The judgment of the Circuit Court will therefore be affirmed.

Affirmed.

Anna Mattes v. John Mattes.

1. **CONDONATION**—*what does not establish.* The fact that the wife after knowledge of the adulterous conduct of her husband continues to reside with him in the family homestead, does not establish condonation where she occupied a separate room and denied him cohabitation.

Divorce proceeding. Appeal from the Circuit Court of Macon County; the Hon W. C. JOHNS, Judge, presiding. Heard in this court at the November term, 1904. Reversed and remanded with directions. Opinion filed June 21, 1905.

REDMON & HOGAN, for appellant.

No appearance for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

Appellant filed her bill against appellee for divorce on the ground of adultery, and for alimony and the custody of two minor children. Appellee answered the bill denying the adultery alleged, but subsequently withdrew his answer, whereupon he was defaulted and the bill taken *pro confesso*. Upon the hearing before the chancellor the bill was dismissed for want of equity. The evidence clearly establishes the adultery charged in the bill, but it appears from the record that the chancellor dismissed the bill upon the ground that appellant had condoned the adultery alleged and proved.

The parties were married in 1882 and continued to live together as husband and wife until November, 1898, when appellant left because of his adultery and remained away from him about seven months. At the end of that time a reconciliation was effected and the marriage relation resumed. In June, 1903, appellant learned that appellee had become enamored of another woman with whom he sustained adulterous relations. Appellant then refused to cohabit with appellee as his wife, but continued to reside in the homestead occupied by her husband and their two minor daughters until April, 1904, when she left and went to reside with her mother. During all the time following her knowledge of appellant's adulterous conduct in June, 1903, she has refused to cohabit with him and while living in the same house with appellee has occupied a separate room. If appellant has condoned appellee's adultery, such condonation must be predicated solely upon the fact that she did not leave him at once but continued to live in the family home, in the manner stated, until April, 1904. Condonation is forgiveness by the injured party of an antecedent matrimonial offense, upon condition the guilty party will not repeat the offense, and is dependent upon future good usage and conjugal kindness. *Sharp v. Sharp*, 116 Ill., 509. There is nothing in this

record tending to show appellant forgave her husband. The house in which appellant lived with appellee and their children was the family homestead. She was there by as much right as was appellee and she owed to her two minor daughters the special duty of care and nurture, which she could best perform by remaining with them. In refusing to accord her husband marital rights and by occupying a separate room in the house she did all within her power, consistent with her duty to her children, to manifest her disapproval of his conduct. The fact that she remained silent should not, under the circumstances, be construed as acquiescence or forgiveness on her part amounting to condonation. Condonation is not so readily inferred against the wife as against the husband. 2 Bishop on Marriage, Divorce and Separation, sec. 284.

The decree of the Circuit Court is reversed and the cause remanded with directions to enter a decree of divorce according to the prayer of the bill, and to award to appellant such alimony and make such order regarding the custody of the children as equity may demand.

Reversed and remanded with directions.

Fraternal Aid Association v. Martha Hitchcock, for use, etc.

1. **FRATERNAL BENEFIT SOCIETY**—*when by-law of, will not be enforced against member.* A by-law of a benefit association authorizing an officer of such association finally to construe a law thereof purporting to limit its liability to pay benefits and obligating a member to abide the decision of such officer in the construction of such by-law, will not be enforced by the courts against a member if it be possible to avoid that result.

2. **FRATERNAL BENEFIT SOCIETY**—*when by-law of, invalid.* A by-law such as is mentioned in the preceding paragraph of syllabus is, upon grounds of public policy, invalid as an attempt to usurp the judicial functions of government.

3. **FRATERNAL BENEFIT SOCIETY**—*by-law of, construed.* The by-law in question in this case, which, among other things, purported

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to give the general president of the fraternal association authority finally to construe the laws of the association and decide all questions arising thereunder, *held*, to relate to the construction of such by-laws and the decision of such questions as concerned the government of the association and the general conduct of its affairs, and not as investing such officer with the power finally to determine the contract liability of the association to its members.

4. *EXTRA-HAZARDOUS EMPLOYMENT—when entry into, voids benefit certificate.* Where a member has bound himself to be subject to the by-laws of the fraternal association at the time he became a member, and all by-laws thereafter enacted, if he thereafter engages in an occupation expressly prohibited by the by-laws, he thereby incurs the penalty of having his certificate suspended until he has refixed his status by a compliance with the by-laws of the association in such case made and provided.

5. *EXTRA-HAZARDOUS EMPLOYMENT—when member of fraternal benefit association cannot recover because of.* A recovery cannot be had upon a benefit certificate issued to a member of a fraternal benefit society who, after its issuance, entered into employment prohibited by the by-laws of the association and thereupon executed a waiver of liability in the event of death resulting from such employment where death did result to such member by reason of such employment.

Action of assumpsit. Appeal from the Circuit Court of Christian County; the Hon. SAMUEL L. DWIGHT, Judge, presiding. Heard in this court at the November term, 1904. Reversed, with finding of facts. Opinion filed June 21, 1905.

CHAFEE & CHEW, for appellant.

FRANK P. DRENNAN, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

Appellee recovered a verdict and judgment against appellant in the court below for \$1,000, upon a benefit certificate for that amount, issued by appellant to George R. Hitchcock, August 9, 1899. The certificate provided that it was issued subject to the statements made by the insured in his application dated August 5, 1899, and all the provisions contained in the fundamental laws of the general council, and was liable to forfeiture if the insured should not comply with said fundamental laws, and such by-laws as are or may

be adopted by the general council, or by the local council of which insured was a member.

At the time insured became a member of appellant association, section 1 of law 1, of its so-called fundamental laws, provided as follows:

"The persons engaged in the following occupations shall not be admitted to membership: Railway engineers, freight brakemen, switchmen, or couplers, wholesalers or manufacturers of intoxicant liquors, saloonkeepers or bartenders, sailors on seas or lakes, miners (except salt miners), employes of powder factories, professional base ball players, balloonists or employes occupying positions of danger in electric light or power works: PROVIDED, That one who has held continuous membership for one year or more, and enters one of the above occupations he may continue his membership by filing a waiver with the General Secretary, waiving any claim under his certificate for casualty or death, caused either directly or indirectly, by or through the prohibited occupation:

PROVIDED, further, That any member engaging in the business of wholesalers and manufacturers of intoxicant liquors, saloonkeeper or bartender, shall thereby forfeit his membership."

Section 1 of article VII of the by-laws, defining the powers of the general president of the association, provided: "He shall decide all questions of law and order, and his construction shall be final until reversed by the general council."

Subsequently, and before the death of the insured, section 1 of law 1 relating to prohibited occupations, was amended so as to read as follows:

"The persons engaged in the following occupations shall not be admitted to membership: Firemen, switchmen, or couplers, sailors on seas or lakes, miners (except salt, gold or zinc miners), employes of powder factories, professional base ball players, and balloonists or employes occupying positions of danger in electric light or power works; but any member

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of this association who has held continuous membership for one year or more who shall enter upon one of the above occupations may continue his membership by filing a waiver with the General Secretary, waiving any claim under his certificate for casualty or death caused either directly or indirectly, by or through the prohibited occupation. But the entrance of such member upon the duties of his prohibited occupation shall of itself suspend his beneficiary certificate until he shall file the above waiver with the General Secretary of this association."

And section 1 of article VII of the by-laws, defining the powers of the general president, was amended so as to read as follows: "He (the General President) shall construe all laws of this Association and decide all questions arising thereunder, and his decisions shall be final until reversed or modified by the General Council."

In his application for membership in appellant association, the insured stated his occupation as a "laborer," and such application contained among other things, the following declaration:

"I further declare and warrant, That I am not now engaged in the occupation, to be engaged in which would debar one from membership in the Fraternal Aid Association. And agree, that if I should engage in any of them without signing waiver, or at any time engage in the manufacture or sale of alcoholic liquors, or acquire the habit of drunkenness, or daily and excessive use of intoxicants, opium or other narcotic drugs, or shall acquire any other habit, which may imperil my life, I shall for myself, my heirs, assigns, representatives and beneficiaries, forever forfeit all the rights and privileges which might otherwise accrue to me and them by reason of my membership in the Fraternal Aid Association."

October 13, 1899, about two months after the certificate sued on was issued to insured, he changed his occupation from laborer on the surface of the ground to that of track

layer in a coal mine. On September 4, 1901, in response to a request by the local secretary of appellant association for a decision by the general president upon the status in the association of members employed as drivers, track layers, timber men, grippers and in other occupations in coal mines, the general president replied as follows: "The intent of the law is that all persons working under ground in mines are classed as 'miners' and come under the head of 'Hazardous Risks.' They are all miners within the meaning of the law. In regard to some of your members not wanting to sign the waiver, would call their attention to chapter 11, par. No. 149, Section 6, Page 39, beginning the latter part of said paragraph: 'But the entrance of such member upon the duties of his prohibited occupation shall of itself suspend his beneficiary certificate until he shall file the above waiver with the General Secretary of this Association.' "

Upon receipt of this letter, the local secretary of appellant association told the insured that under the by-laws of 1901 and the interpretation of the general president, he understood insured's certificate would be void if insured did not sign a waiver. The local secretary then gave the printed waiver and a stamped envelope addressed to the general secretary, to insured, and the latter signed same and mailed it to the general secretary, by whom it was received January 7, 1902. The waiver, was as follows:

"Waiver, EXTRA HAZARDOUS OCCUPATION. I, George Hitchcock, a member of Pana Council 275, located at Pana, State of Illinois, holding Benefit Certificate No. 32819 for \$1,000, having changed my occupation from that of laborer to that of mine laborer, a prohibited occupation by the laws of the Fraternal Aid Association, and recognizing that it is an occupation of greater hazard to life than the occupation which the Fraternal Aid Association admits to its membership, and that I could not under its laws retain membership in said Fraternal Aid Association in my present occupation, I hereby agree, that in consideration of my Beneficiary Certificate remaining in full force and effect cover-

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ing the insurable risk of my former occupation, that should casualty or disease affecting health peculiar to and incident to my new occupation lead to or be the cause of my death or disability in any wise, I hereby waive any and all claims upon the Fraternal Aid Association under my Beneficiary Certificate.

GEO. HITCHCOCK.

Attest: B. F. MILLIKEN,

(Seal.)

Local Secretary."

On January 9, 1902, the insured, while employed as a track layer in a coal mine, was killed by a stone falling on him. By appropriate pleadings, issue was joined upon the questions involved and here presented for determination.

In support of the judgment of the Circuit Court, it is urged by appellee, that the occupation of track layer in a coal mine was not a prohibited occupation under any by-law in force at the time of the death of the insured; that the decision of the general president of appellant association, that persons working under ground in mines should be classed as "miners" and the insured be required to sign a waiver, was without authority and was a fraud upon the rights of the insured and of appellee as his beneficiary; that the by-law giving the general president authority to construe the meaning of the word "miners," as designating a prohibited occupation, is unreasonable; that as the by-laws in force at the time insured became a member of appellant association did not contain any self-executing provision forfeiting the certificate in case the insured should engage in a prohibited occupation, within one year thereafter, the subsequent amendment of the by-laws by incorporating such self-executing provision was not operative as to the certificate in question; that the insured having changed his occupation nearly two years before the decision of the general president, and appellant association having, with full knowledge of that fact, collected dues and assessments from the insured, the insured had acquired a vested right to remain a member of the association, and any by-law enacted or decision thereafter rendered divesting him of that right would be unlaw-

ful; that it not appearing from the record that insured had a right to change the beneficiary named in his certificate, such beneficiary had acquired a vested interest in the certificate.

In the view we are disposed to take of this case, it is not necessary to determine whether the insured while engaged in the occupation of track layer in a coal mine, was a miner within the meaning of section 1 of law 1, designating "miners" as one of a class of prohibited occupations.

It has been held, in effect, that a by-law of a benefit association authorizing an officer of such association finally to construe a law of the association purporting to limit its liability to pay benefits, and obligating a member to abide the decision of such officer in the construction of such by-law, will not be enforced by the courts against a member, if it be possible to avoid that result. *Railway Conductors' Ben. Assn. v. Robinson*, 147 Ill., 138. We are inclined to the opinion, that such a by-law should, upon grounds of public policy, be held by the courts to be invalid as an attempt to usurp the judicial functions of government. 1 *Bacon on Ben. Soc.*, 3rd ed., sec. 123; 2 *id.* sec. 400 a; *Green v. Bd. of Trade*, 49 L. R. A. 365, note 372.

The by-law in question, purporting to give the general president authority finally to construe the laws of the association and decide all questions arising thereunder, may be held to relate to the construction of such by-laws and the decision of such questions as concern the government of the association and the general conduct of its affairs, and not as investing such officer with the power finally to determine the contract liability of the association to its members, and we shall so hold in this case.

The insured having bound himself to be subject to the by-laws of the association at the time he became a member and all by-laws thereafter enacted, if he thereafter engaged in an occupation expressly prohibited by the by-laws, incurred the penalty of thereby having his certificate suspended until the filing of a waiver, unless the association had in some manner waived such suspension. *Sup. Lodge of K.*

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of *P. v. Kutscher*, 179 Ill., 340; *Peterson v. Gibson*, 191 Ill., 365.

By the terms of his contract of insurance, the insured was required upon engaging in a prohibited occupation to file a waiver with the general secretary waiving any claim under his certificate for casualty or death caused by or through such prohibited occupation. The collection by the officers of the association of dues and assessments from the insured after the filing of such waiver by him would not operate to waive liability if the insured met casualty or death by or through the prohibited occupation, because the certificate remained in force as an indemnity against casualty or death caused otherwise than by or through the prohibited occupation, and for indemnity against casualty or death not caused by or through such prohibited occupation insured remained liable to pay dues and assessments.

There can be no doubt, under the evidence in this case, but that the insured signed the waiver introduced in evidence and forwarded the same to the general secretary of appellant association, and that the same was received and filed by such officer. The insured thereby voluntarily concurred in and submitted to the decision of the general president, that the occupation of track layer in a coal mine was a prohibited occupation within the meaning of the by-laws, and waived any claim against appellant association for casualty or death caused by or through such occupation. The decision of the general president, if not binding on the insured, cannot be said to be unreasonable, but as we think, was clearly within the spirit, if not within the letter of the by-law designating prohibited occupations, and the insured having voluntarily assented to and adopted the construction placed upon such by-law, was bound by the waiver executed by him. The insured having filed the waiver provided for in the contract of insurance, any question of a waiver of its liability by the association by the collection of dues and assessments from the insured prior to his filing such waiver or of the binding force and effect of the subsequently enacted provision forfeiting the certificate in case the insured should

engage in a prohibited occupation within one year thereafter, does not arise.

The contention of appellee that she had a vested interest in the benefit certificate is without force. The beneficiary named in a benefit certificate issued by a fraternal benefit association has a mere expectancy and not a vested interest during the life of the insured. *Middeke v. Balder*, 198 Ill., 590.

The judgment of the Circuit Court is reversed without remanding.

Reversed.

Finding of facts, to be incorporated in the judgment of the court.

We find that the insured, George Hitchcock, was killed while employed as a track layer in a coal mine; that prior to his death, the said Hitchcock, as his own free and voluntary act, filed with the general secretary of appellant association, a waiver recognizing his occupation of track layer in a coal mine, to be a prohibited occupation within the meaning of the by-laws of said association, and thereby waived any claim against appellant association for his death caused by said occupation.

Kellyville Coal Company v. William J. Moreland.

1. **EXPERT OPINION**—*when question calling for, erroneous.* A question as follows: "As an expert miner what would you say was necessary to have been done in that mine, taking into consideration the condition that existed up and prior to the time of the injury, to have made it reasonably safe," and like questions are erroneous, especially where it does not appear that the witness knew the condition referred to in the question.

2. **MINE OWNER**—*degree of care required of, at common law.* In an action for personal injuries against a mine owner, a recovery can be had, where the declaration relies upon the common law, only by showing the failure of the defendant to exercise ordinary care.

3. **PERSONAL EXAMINATION**—*court without power to order.* In an action for personal injuries, the trial court is without power to en-

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ter an order compelling the plaintiff to submit his person to an examination by a physician of the defendant.

Action on the case for personal injuries. Appeal from the Circuit Court of Vermillion County; the Hon. J. W. CRAIG, Judge, presiding. Heard in this court at the November term, 1904. Reversed and remanded. Opinion filed June 7, 1905.

H. M. STEELY, for appellant.

A. H. PARTLOW and S. M. CLARK, for appellee.

MR. JUSTICE GEST delivered the opinion of the court.

Appellee brought this suit for personal injuries sustained by him while employed in the coal mine of appellant.

The declaration avers that plaintiff was employed in the mine as an entry driver in what is called the fifth south south-west entry, that defendant negligently failed to keep said entry at a point near room ten in a reasonably safe condition, whereby a portion of the roof fell upon plaintiff and injured him while he was in the exercise of due care, pursuing his work as such entry driver. The accident happened on the fifteenth day of December, 1903, between ten and eleven o'clock in the morning. As the entry was driven room-necks were cut on the left side and cross-cuts on the right side with a cutting machine which was operated by plaintiff and his helper. The room-necks and cross-cuts were not directly opposite. The south side of the cross-cut was on a line with the north side of the room-neck. They were about ready to turn off room-neck 13 when the accident occurred. The room-necks from No. 10 to No. 13 were about forty feet apart. Plaintiff was going back from the face of the entry to the sight bars which were back of room ten. Sight bars are used for the purpose of sighting the entry to keep it straight. When opposite room-neck ten a small stone from the roof fell and knocked plaintiff down and then a large one from three and a half to four feet long, two feet wide and two to five inches thick fell on him and seriously injured him. A verdict was rendered for the plaintiff for \$2,000 and judgment entered thereon.

It was incumbent on the plaintiff to prove by legitimate evidence that defendant was guilty of negligence. Plaintiff's witness, William Webber, testified on direct examination that he had seen the timber man working in and around the point where the accident occurred taking down rock and cleaning up. On cross-examination he stated that he did not know whether it was before or after the accident that he had seen them working there. Plaintiff's witness, Alex Crane, stated that Fred Trent was timber-man and rock-man; that a few days before the injury to plaintiff he called Trent to take down a loose rock in the locality of the accident; that he gave Trent notice of loose rock somewhere in that vicinity. Plaintiff's witness, Everett, stated that he had noticed the conditions at room ten about a week before the accident, but states nothing of what he saw. Plaintiff's witness, Ruschel, states that the rock which fell on plaintiff is what miners call a slab that had scaled off of the roof. Two of plaintiff's witnesses say there was no chalk mark on the stone that fell on the plaintiff. Fred Trent, the timber-man, denies having had any conversation with either Webber or Crane as testified to by them, said he had never been called to that point or vicinity to take rock down. The plaintiff testified that the roof at the place where he was hurt looked solid when he would examine it and go under it. Cruikshank, mine examiner at defendant's mine, stated that he examined the mine throughout during the night of the day before the accident, December 14; that he carried his light and a sounding rod; that he walked through the entire mine, rooms and entries, and sounded as he walked and marked with a chalk mark where he found loose rock; that he found no loose rock or other dangerous conditions in that entry; that by room-neck No. 10 there was a good smooth roof in the entry. J. A. Donaldson, assistant mine manager of defendant, states the roof was smooth and solid at the place of the accident; that he went down that entry every day or every other day with his sounding rod and examining the roof. Karroll, witness for defendant, says he noticed the roof at the

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place of the accident the day before the accident; that it was smooth and there were no cracks in it.

The foregoing is substantially all the testimony in the record tending to show the actual situation of the roof at the place of the accident or its vicinity just previous to the accident.

The court, over defendant's objection, allowed the following question to be answered by plaintiff's witness, Webber: "As an expert miner what would you say was necessary to have been done in that mine, taking into consideration the condition that existed up and prior to the time of the injury, to have made it reasonably safe?" The witness answered: "I think the entry should have been cross-barred," and then proceeded to make a lengthy statement how that could be done. The question covers the entire mine, it assumes that the witness knew the "condition" whereas he testified to no facts showing its condition at the place of the accident and previous to the accident; it calls for an expert's opinion without any statement of facts on which it was to be based, and it assumes that the place was not reasonably safe, one of the precise questions the jury were to determine from the evidence. The plaintiff's witness, Crane, was asked: "As a practical miner what would you say was necessary there, taking into consideration the conditions as you saw them, to make that roof reasonably safe?" and over defendant's objection he answered: "Well, I think there should be timbers there, myself. Put up a couple of posts or cross-bars to make it perfectly safe." The same question was put to the plaintiff's witness, Ruschel, except that he was directed to take into consideration "the conditions as you saw them immediately after the accident," and he answered: "Why, I would say to timber it, put up a neck-bar in the roof and a cross-bar in the entry." The plaintiff's witness, Everett, in answer to a like question, objection to which was overruled, said: "Well, there should be a neck-bar over the room and cross-bars in the entry," and in answer to the question. "For what reason should these timbers be placed as you have described?" said: "Why, to make the roof safe, I should

judge." By allowing these questions to be asked the court in substance told the jury that the entry was not in reasonably safe condition at and prior to the time of the accident. The defendant was not an insurer. The declaration was at common law, not under the statute concerning mines. All the defendant was bound to do was to use reasonable care to provide a reasonably safe place for plaintiff to work in. Whether it did use reasonable care and whether the place was reasonably safe were both questions of fact to be determined by the jury and neither question should have been assumed against the defendant by court, counsel and witness as was done, and especially so in view of the meager proof that was made by plaintiff on both questions. There is much other matter in this record highly injurious to defendant. The following is a part of the plaintiff's examination of his witness, Webber, who was an ordinary coal miner in that mine:

"Q. In what manner should this inspector perform his labor?

Mr. Steely. I object to that. That is entirely foreign to the issues here.

The Court. He can answer the question.

Exception by defendant.

A. By examining the top and the air.

He examines the top with a sounding rod that he carries made of steel, I presume.

Q. How frequently should he make this examination through the entry?

Objected to by defendant.

The Court. How frequently was it the custom there to do it?

Q. What I mean is, how often would he sound the roof through an entry in making a proper examination?

Objected by defendant.

The Court. Yes, the proper examination. How often did he do it?

A. Once every twenty-four hours.

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Q. Well, you don't get my point. What I want to know is, how did he make this examination?

A. Well, I suppose he does it at almost every point that he has any idea there is a loose rock. Of course an experienced man he knows in walking along; he observes the top, and if he sees a place he has any doubt about he makes his examination there. If there is timbers or an indication in the roof that it is perfectly safe, he doesn't examine it. As a rule he may throw his rod up against it and walk on, but it is the dangerous places he makes the closest inspection of.

Q. A place like this, where there was cross-cut and a large opening, such as you have described, exposed without timbers, in what manner would he make his examination at such points?

Objection to by defendant. Objection overruled. Exception by defendant.

A. He should make a thorough examination of a place of that kind."

All of which was irrelevant, incompetent, misleading and prejudicial. There are many other instances of like character.

There was no error in refusing appellant's motion to compel appellee to submit his person to an examination by a physician for the defendant. The court has no such power.

The first instruction given for plaintiff as printed in the abstract is not clear. It is open to two constructions. One construction is that the defendant was guilty of negligence if it did not have the roof in reasonably safe condition, and the other is that the defendant was guilty of negligence if it had not used reasonable care to have the roof in reasonably safe condition. The first construction is manifestly not the law. When the evidence is conflicting and close the instructions should be accurate. Doubtless upon another trial more care will be exercised in the examination of witnesses and the preparation of instructions.

The judgment will be reversed and the cause remanded.

Reversed and remanded.

Springfield Consolidated Railway Company v. Martha Farrant.

1. INSTRUCTION—*when, upon right of recovery, proper.* An instruction upon this subject is proper which tells the jury that if they believe from the evidence that the plaintiff has proved her case as laid in her declaration by a preponderance of the evidence, they should find for the plaintiff.

2. INSTRUCTION—*when estoppel to complain of, arises.* One party cannot complain of an instruction given for his opponent when the court has given the same instruction at his request.

3. INSTRUCTION—*when, upon manner of arriving at verdict, is improper.* An instruction is improper which tells the jury in substance that it was its duty to find a verdict from the evidence under the instructions of the court, that all the instructions have application to the facts in controversy, that the jury must not disregard the instructions nor find a verdict contrary to the law as therein stated, nor by lot or chance, that no juror should consent to a verdict which does not meet with the full approval of his own judgment and conscience after due consideration of the evidence and the law as set forth in the instructions and after due deliberation with his fellow jurors.

4. INSTRUCTION—*must be predicated upon the evidence.* An instruction which authorizes the jury to allow damages for future pain and suffering and for a permanent injury, is erroneous, where there is no satisfactory evidence that there would be future pain and that there was a permanent injury.

Action on the case for personal injuries. Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the November term, 1904. Reversed and remanded. Opinion filed June 7, 1905.

WILSON, WARREN & CHILD, for appellant.

DAVIS McKEOWN, for appellee.

MR. JUSTICE GEST delivered the opinion of the court.

On the 17th day of February, 1904, appellee was injured as she was alighting from a car of appellant at Cleveland avenue in the village of Ridgely, a suburb of Springfield.

The averment of the declaration is that as she was alighting and before she had time to alight, the servants of defendant suddenly started the car forward and thereby threw

plaintiff from the car to the ground, by reason whereof her ankle was sprained and broken, her spinal column injured and internal injuries by her suffered. A verdict and judgment were rendered in her favor for \$1,000.

It is claimed by appellant that the verdict is against the evidence, that the evidence shows that plaintiff received her injuries by reason of her own negligence. We are not disposed to reverse the judgment on that ground. It is also urged that the first instruction given for plaintiff is erroneous. The instruction is that if the jury believe from the evidence that plaintiff has proved her case as laid in her declaration, by a preponderance of the evidence, they should find for the plaintiff. That instruction has been many times held good and we perceive no reason for holding to the contrary in this case. Moreover the first instruction asked by defendant and given states to the jury "that the plaintiff must prove her case as charged in her declaration by a preponderance of the evidence." One party may not complain of an instruction given for his opponent when the court gives the same instruction at his request. The court refused to give an instruction asked by defendant which stated that it was the duty of the jury to find a verdict from the evidence under the instructions of the court, that all the instructions have application to the facts in controversy, that the jury must not disregard the instructions nor find a verdict contrary to the law as therein stated, nor by lot or chance, that no juror should consent to a verdict which does not meet with the full approval of his own judgment and conscience after due consideration of the evidence and the law as set forth in the instructions and after due deliberation with his fellow jurors. There was no error in refusing this instruction. *Birmingham Fire Ins. Co. v. Emilie Pulver*, 126 Ill., 329; *Addison v. The People*, 193 Ill., 405.

The remaining alleged error to which our attention has been called by appellant is in giving plaintiff's instruction upon the measure of damages and that the damages are excessive by reason of that instruction. The instruction directs the jury that, if they find for the plaintiff, in determining

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the amount of her damages they may take into consideration among other things, "the pain and suffering endured by her, if any, resulting from such physical injuries and such further suffering and loss of health, if any, as the jury may believe from the evidence before them in this case she has sustained or will sustain by reason of such injuries." The objection made to the instruction is that there is no competent evidence to which that part of the instruction referring to future suffering and loss of health is applicable, that the jury are left to speculation as to such matters. Plaintiff received her injury February 17. Dr. Berry states that he on the next day visited her and found her suffering from a sprained ankle, that he visited her on five different occasions, the last being not later than March 2. On the second visit and succeeding visits she complained of her back. He examined her but found no broken bones or dislocations or anything wrong with her back except that it seemed to be sprained; that in his opinion she may recover the normal use of her ankle inside of a year from the time she was injured and possibly it would always remain weak; that he has never examined her since March 2 and his opinion is based on the examinations he made at and before that date. Mrs. McClotchey, a witness for plaintiff, states that on Sunday, a day or two before the trial, she called on plaintiff at her house and saw her foot, that it was then black and swollen, that plaintiff was hobbling around the house, that on the next day, Monday, witness and plaintiff went down town to see Dr. Taylor about her foot. Plaintiff was injured February 17, 1904; the trial was June 30, 1904. Dr. Berry had not seen plaintiff nor made any examination of her foot or back for nearly four months; he made no examination of her in court. Her foot was not then exhibited to him or the jury. Dr. Taylor who had been visited for treatment of her foot was not called as a witness nor any reason given for his absence. It would appear to have been within the power of the plaintiff to make much more satisfactory proof of the condition of her foot if it had been desired to do so. The inference from her failure

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so to do is not favorable to her. The evidence upon which to base any conclusion of permanent injury is very unsatisfactory. Dr. Berry says that possibly her ankle may always be weak. That is mere speculation. It is very questionable whether there be any sufficient basis in the evidence for the instruction above mentioned. We think the ends of justice will be best subserved by another trial when the plaintiff will have the opportunity, if she desires to use it, to make clear the extent of her injuries.

The judgment will be reversed and the cause remanded.

Reversed and remanded.

Lou B. Denning, et al., v. Charles I. Will, administrator.

1. TRANSCRIPT OF RECORD—*contents of, cannot be determined by stipulation.* The parties cannot stipulate to the incorporation into the transcript of the record of matters under the law foreign thereto, and where it is done the court will not upon review consider the same.

Contest in court of probate. Error to the Circuit Court of McLean County; the Hon. COLSTIN D. MYERS, Judge, presiding. Heard in this court at the November term, 1904. Affirmed. Opinion filed June 7, 1905.

PEIRCE & PEIRCE, for plaintiffs in error.

CHARLES I. WILL, defendant in error, *pro se*.

MR. JUSTICE GEST delivered the opinion of the court.

The record in this case shows, first, an order of the court overruling "the motion to dismiss the appeal heretofore entered herein"; second, a waiver of jury, a hearing by the court, a finding of the issues "in favor of the appellee, Charles I. Will, admr., etc." and judgment May 25, 1901, confirming the report of said administrator, ordering distribution in accordance therewith, adjudging costs against plaintiffs in error and allowing appeal to them upon their filing bond in the sum of \$200 with security to be approved

by the clerk, bond to be filed in twenty days and bill of exceptions to be filed in sixty days; third, a stipulation between the parties dated June 3, 1894, and filed June 4, 1894, to-wit: "Whereas the transcript, files and evidence in the above entitled cause on appeal by the said Lizzie and Lou B. Denning from the Probate Court of McLean county, Illinois, to the Circuit Court of said county have been mislaid and lost and cannot be found. Now therefore in consideration of the premises it is hereby stipulated by and between the parties hereto that the clerk of said Circuit Court shall include in the record to be made up in said cause the following files in the matter of the estate of David Skinner, deceased, in said Probate Court, to-wit"; (stating a dozen different papers). "And the following files in the matter of the estate of Mary E. Skinner, deceased, in said Probate Court, to-wit" (stating papers); and also certain described records of mortgages in the recorder's office in McLean county, "all of which when copied by the said clerk into the transcript of the record in the above entitled cause shall become and remain a part thereof for the consideration of this cause by the said Appellate Court"; fourth, copies of the papers and records above mentioned; fifth, the clerk's certificate to the transcript; sixth, the assignment of errors. There is no bill of exceptions. The judgment was entered May 25, 1901. In June, 1904, three years afterwards, the parties made a stipulation and filed it with the clerk directing him to copy certain papers in the Probate Court and certain records in the recorder's office which when done shall "become and remain a part of the record for the consideration" of this court. Records for the consideration of this court cannot be so made up. There is no question presented for our consideration.

The judgment is affirmed.

Affirmed.

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Julia A. Ross v. Charles I. Will, administrator.

1. CLAIM—*when, should be allowed as of second class. Held, under the particular facts of this case, that the claimant was entitled to an allowance of her claim as of the second class.*

Contest in court of probate. Appeal from the Circuit Court of McLean County; the Hon. COLSTIN D. MYERS, Judge, presiding. Heard in this court at the May term, 1904. Reversed and remanded. Opinion filed June 7, 1905.

DOOLEY & DOOLEY, for appellant:

CHARLES I. WILL, administrator, appellee, *pro se*.

MR. JUSTICE GEST delivered the opinion of the court.

The abstract furnished to us is very meager and unsatisfactory. It is scarcely possible to learn from it the facts of the case and the proceedings that have been had. We conclude from it and from the presentation of the case made to us in briefs and arguments of counsel that one Daniel Skinner was the owner of a parcel of land occupied by him and his wife, Mary E. Skinner, as a homestead; that upon the death of Daniel Skinner, Charles I. Will was appointed administrator of his estate, and an award of \$842 was made to Mary E. Skinner, widow; that the widow on December 5, 1895, executed and delivered to appellant, Julia A. Ross, a note for the sum of \$1,100 and also a mortgage securing the same, upon the said homestead, which was duly acknowledged and recorded on the same day, and which contained full covenants of warranty. The widow, Mary E. Skinner, died October 4, 1899, leaving no property, real or personal, except the allowance of the above mentioned award, and Charles I. Will was appointed administrator of her estate also. The premises were sold upon the application of Mr. Will, as the administrator of David Skinner, for the payment of debts against his estate; the proceeds of that sale came into the hands of Mr. Will as the administrator of the estate of said Mary E. Skinner, in pursuance of an order of the County Court, presumably on account of payment of the

said award to the widow. Appellant filed her claim upon said note and mortgage against the estate of Mary E. Skinner and asked that it be allowed and made a first and preferred claim. The County Court allowed it in the seventh class. Appellant appealed from that order of allowance to the Circuit Court and upon a hearing in that court the same order was made as had been made by the County Court and adjudging the costs against appellant, and thereupon she appealed to this court. It is apparent from the foregoing statement that the only question before this court is whether the appellant Ross is entitled to have her claim established as a second class claim. The doctrine as established in *Lagger v. Mutual Union*, 146 Ill., 283, appears to be applicable to the facts of this case. *Lagger* owned a lot of ground occupied by him as his homestead and died intestate, leaving a widow and children. The widow was appointed administratrix and subsequently married one John Spies. She had an unpaid claim for her award in the sum of \$1,840.10. She petitioned the Probate Court for an order to sell the premises to pay that claim; the order was entered, the sale was made and deed executed to Cora B. Hirtzel, and the latter immediately conveyed the lot to Mrs. Spies and thereupon she borrowed \$4,200 from the Loan Association and with her husband executed bond and trust deed with full covenants of title to secure same. Bill was afterwards filed to foreclose the trust deed, and the children of *Lagger*, Mrs. Spies' first husband, were made defendants thereto. A cross-bill was filed by them setting up in substance that said sale was in fact made by the administratrix to herself. The court so found and set aside the sale. The money borrowed from the Loan Association had been used in improving the property. Mrs. Spies had receipted to the *Lagger* estate for the amount at which the sale had been made to Cora Hirtzel, \$1,650, but no money in fact had been paid to her. The value of the property was found to have been enhanced by the improvement in the sum of \$2,500. The court, on ordering the sale by the administratrix set aside, found that the equitable interest of Mrs. Spies in the premises, and to which the Loan

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Association was entitled, was the amount of her widow's allowance, \$1,840.10, and the amount of the enhanced value by the improvement, \$2,500, in all the sum of \$4,340.10, and ordered a resale of the premises for the payment of that sum to the Loan Association. The court holds in that case: "It would be inequitable to pay over the fund in its hands—realized from the enforcement against the premises of the claims for widow's award and for improvement—to the mortgagor rather than to the mortgagee, in view of the covenants in the mortgage." It would be inequitable, in the case under consideration, to pay out the money arising from the sale of the homestead premises to Mary E. Skinner if she were living or to her heirs, she being dead, or to any other claimant against her estate, not having the same and equal equity with Julia A. Ross, "in view of the covenants in the mortgage" made to Julia Ross.

The judgment of the Circuit Court will be reversed and the cause remanded with directions to the Circuit Court to order the payment of the claim of appellant Julia A. Ross against the estate of said Mary E. Skinner, as a second class claim.

Reversed and remanded with directions.

ELI W. Gilbert v. The People of the State of Illinois.

1. PUBLIC HIGHWAYS—*statute concerning obstruction of, construed.* The statute which makes it a criminal offense to obstruct public highways, etc., does not apply to the obstruction of private highways.

2. INSTRUCTIONS—*must be predicated upon the issues.* Instructions in a criminal case must be predicated upon the issues; otherwise they are erroneous.

3. INSTRUCTIONS—*should not contain abstract propositions of law.* Instructions in a criminal case should not contain abstract propositions of law, and where they violate this rule and tend to confuse and mislead, they are erroneous and ground for reversal.

4. FINE—*jury unauthorized to fix amount of.* In a prosecution for an obstruction of a highway, it is improper to authorize the jury

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to fix the amount of fine to be imposed in the event of guilt found.

5. *CONCLUSIONS—when admission of, not ground for reversal.* Where the court permits the conclusions of a witness to be given, such action will not result in reversal where it appears that the facts upon which the conclusions were based were subsequently put in evidence.

6. *PUBLIC PROSECUTIONS—by whom should be conducted.* The state's attorney should conduct all public prosecutions and it is error for him to permit other counsel employed and paid by private parties to act in his stead, especially where they have not been appointed by the court.

7. *AMENDMENT—information capable of.* An information in a criminal case is properly amendable with respect to matters of form.

Prosecution for obstruction of highway. Error to the County Court of Montgomery County; the Hon. M. J. McMURRAY, Judge, presiding. Heard in this court at the November term, 1904. Reversed and remanded. Opinion filed June 7, 1905.

JETT & KINDER, for plaintiff in error.

L. V. HILL, State's Attorney, for defendant in error;
Lane & Cooper, of counsel.

MR. JUSTICE GEST delivered the opinion of the court.

The State's Attorney of Montgomery county filed in the County Court of that county an information of two counts against the plaintiff in error charging him with obstructing a certain described highway which is designated in the first count as a public highway and in the second count as a private highway. Upon a trial by jury a verdict was rendered finding him guilty and imposing a fine of one cent and the court entered judgment against him for one cent and costs.

The information is based upon sub-division 5 of paragraph 221 of the Criminal Code concerning nuisances which reads as follows: "It is a public nuisance to obstruct or encroach upon public highways, private ways, streets, alleys, commons, landing places and ways to burying places." The penalty fixed for causing such a nuisance is a fine not more than one hundred dollars. Hurd's Statutes of 1903, page 657. The defendant entered his motion to quash the in-

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formation and each count thereof and the court overruled the motion. The motion should have been sustained as to the second count. That count charges the defendant with obstructing a "private highway." The statute above quoted makes it an offense to obstruct public highways and private ways, not private highways. A private highway is unknown to the law of this state. Upon the trial the court gave the following instruction to the jury on behalf of the people:

"The court instructs the jury as a matter of law that it is a public nuisance to obstruct or encroach upon the public highways, private ways, streets, alleys, commons, landing places and ways to burying places and in this case if you believe from the evidence beyond a reasonable doubt that the road in question is either a public highway or private way and that the defendant erected or constructed a fence across the same, then it is your duty to find the defendant guilty."

No count in the information charged the defendant with obstructing a private way. It was error to give that instruction. So far as we are able to discover from the abstract in this case the alleged way is a *cul de sac* and the land over which it runs was many years ago owned by one William Banning. One Hermann owned land at its terminus. Hermann desired a way out to a public highway lying east and running north and south. Banning also wanted a way to that highway to accommodate a forty-acre tract lying south-west and which would be adjacent to the proposed way. It is claimed by the people that the way runs west from said highway for a quarter of a mile and then turns and runs north to the Hermann land and was first established by these parties to accomplish their said wishes; that Banning dedicated the way and that the dedication was afterwards accepted by the proper authorities, or that at least it became a highway by prescription. It is also claimed that one Bowles became the owner of the land which was owned by Hermann at the time of the first using of the way and as such owner had acquired a right of private way therein appurtenant to his land. The defendant is in the occupancy

of the tract of land over which the way runs and it is conceded he erected the fence complained of. There is evidence in the record tending to show that the alleged way had become a public highway by dedication or prescription, and there is evidence tending to show that Hermann or some successor to his title had acquired a private way on the route as alleged but there is no evidence showing who the Bowles was or is that subsequently became the owner of the Hermann land or how or when he became the owner or that there is privity of title between him and Hermann. Without privity of title between successive owners there is no continuity of possession. Jones on Easements, section 197. The evidence on all material matters except the erection of the so-called obstruction is very loose, indefinite and unsatisfactory. Even if the second count of the information charged obstruction to a private way appurtenant to the so-called Bowles land we could not sustain a conviction on that count on the evidence in this record. It is not necessary for us to determine whether the evidence is sufficient to sustain a verdict upon the first count. The court instructed the jury: "If the defendant is found guilty the form of your verdict should be: 'We, the jury, find the defendant guilty in manner and form as charged in the information and fix his fine at the sum of * * * dollars. (Insert in the blank the amount of the fine.)'" The jury were not authorized to fix the fine but that part of the verdict was surplusage. Under this instruction the jury were directed to find the defendant guilty as charged in the information if they found him guilty under either count. It is not possible to tell whether they found him guilty under the first or second count or both counts. The defendant offered an instruction directing the jury to find the defendant not guilty as charged in the second count but the court refused it. The giving of this instruction would not have cured the mischief caused by the refusal to quash the second count and the subsequent admission of evidence thereunder. Sixteen instructions were given on behalf of the People, one of which is a copy of the first section of the Road and Bridge

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Act, (Hurd's Statutes, page 1585) and seven others are mere abstract propositions of law calculated only to confuse or mislead the jury and should not have been given. The fifth instruction asked by defendant correctly states that it was incumbent upon the People to prove that the alleged highway was a public highway but the court modifies it by adding the words "or private way" and in this there was error as we have above stated. The eighth instruction asked by defendant was also modified by the court and the modification is complained of. As asked it was plainly bad and properly refused. As modified and given it remained bad but no worse and should not have been given. The two remaining instructions asked by defendant were properly refused by the court. Certain evidence was offered by defendant and refused and certain other evidence for defendant had been admitted and was subsequently stricken out and this action of the court is complained of. The court committed no error in that regard; the evidence was manifestly inadmissible. The court denied the motion of defendant to strike out certain answers made by the witness Joel Banning. The motion should have been allowed. The answers were mere conclusions of the witness, but we do not think any injury came to the defendant thereby; his subsequent examination and cross examination remedied any mischief in that respect. It appears from this record that one William Bowles originated this prosecution, that he employed the law firm of Lane & Cooper and they prepared the information, and submitted it to Mr. Hill, the state's attorney, and he signed and filed it in the County Court. The state's attorney did not thereafter personally appear in court at any stage of the proceedings in this cause but Lane & Cooper appeared and conducted the prosecution throughout. The defendant pleaded misdemeanor in abatement and the People by Lane & Cooper asked and obtained leave to amend and did amend the information. It also appears that Lane & Cooper before making the amendment were verbally directed by the state's attorney to make it and in his name, the state's attorney then being engaged in another court. The defendant objected to

the making of the amendment by Lane & Cooper on the grounds, first, that the information was not amendable; second, that the State's Attorney only was authorized to make it, and moved to strike the amended information from the files, but the court overruled the objection and the motion. The information was amendable. *Truitt v. The People*, 88 Ill., 518; *Long v. The People*, 135 Ill., 435. We are not inclined to look with favor upon the practice of conducting public prosecutions by private counsel employed by private parties, and in the absence of the State's Attorney. The statute provides for the appointment by the court of a prosecuting attorney in cases when the State's Attorney is not in attendance. The sixth section of chapter 14, Revised Statutes, is as follows: "Whenever the attorney general or state's attorney is sick or absent, or unable to attend, or is interested in any cause or proceedings, civil or criminal, which it is or may be his duty to prosecute or defend, the court in which such cause or proceeding is pending may appoint some competent attorney to prosecute or defend such cause or proceeding; and the attorney so appointed shall have the same power and authority, in relation to such cause or proceeding, as the attorney general or state's attorney would have had if present and attending to the same." The statute makes no provision for the appointment by the state's attorney of an assistant or deputy, and no authority is vested by statute in private counsel to appear and prosecute a criminal case in the absence of the state's attorney except when appointed by the court, and when so appointed he ceases to be private counsel and becomes vested with all the power of the state's attorney and burdened also with his obligations. The state's attorney is not the attorney of the complaining party or of any individual. He is the representative of the people and is forbidden by law to take any fee or reward from any private person for the performance of his official duties. Section 6a chapter 14, Revised Statutes. In this case neither Lane nor Cooper was appointed by the court to prosecute and neither of them was competent to be appointed because they were employed by a private person for

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a consideration to prosecute. The person appointed by the court becomes state's attorney for that case and gets his compensation as such. The law forbidding compensation to a state's attorney by private parties is a wise one. He is public prosecutor, not a private prosecutor. The law on this general subject is discussed by the Supreme Court in *Hayner v. The People*, 213 Ill., 147. In the case at bar we discover nothing reprehensible in the conduct of the case by Lane & Cooper, who conducted the prosecution. Our remarks have no personal application. If the cause shall be again tried and the state's attorney not be present, the court should make its order appointing some attorney to conduct the case on behalf of the people.

The judgment is reversed and the cause remanded.

Reversed and remanded.

Watson Murdock, et al., v. Sarah M. Murdock.

1. *ANTE-NUPTIAL CONTRACT—when should be set aside.* Where it appears that at and prior to the execution of an ante-nuptial contract the affianced husband did not fully and fairly acquaint his betrothed of the means at his disposal, such contract should be set aside.

2. *WITNESS—when incompetent by reason of interest.* A widow is incompetent by reason of interest in an action instituted by her against the heirs of her deceased husband to set aside an ante-nuptial contract.

BAUME, J., dissenting.

Bill to set aside ante-nuptial contract. Error to the Circuit Court of Douglas County; the Hon. W. C. JOHNS, Judge, presiding. Heard in this court at the November term, 1904. Affirmed. Opinion filed June 7, 1905.

JOHN H. CHADWICK, THOMAS W. ROBERTS, ECKHART & MOORE and P. M. MOORE, for plaintiffs in error.

I. A. BUCKINGHAM and ROY F. HALL, for defendant in error.

MR. JUSTICE GEST delivered the opinion of the court.

John D. Murdock lived in the little village of Murdock in his own house, a Mr. and Mrs. Shell keeping house for him, and was of the age of seventy-six years. He was the owner of 875 acres of land situated in Douglas county and was possessed of personal estate of the value of from ten to fifteen thousand dollars. He was a widower and had six children, two sons and four daughters, all adults and caring for themselves. Mrs. Sarah M. Bentley was a widow of the age of fifty years and had two children, a son and daughter, both adults and having their own homes. She also lived in the village of Murdock on the same street on which Mr. Murdock lived, there being but one house and lot between their residences. She had a homestead estate in the house and lot which she occupied and also was possessed of personal estate of the value of from one hundred and fifty to two hundred dollars and had no prospect of obtaining any more property, real or personal.

On the 26th day of July, 1892, Mr. Murdock and Mrs. Bentley were married. On the 25th day of July, 1892, the day before their marriage, the following paper was executed and acknowledged by them:

"This agreement made and entered this twenty-fifth day of July, A. D. 1892, by and between John D. Murdock, of the county of Douglas and state of Illinois, party of the first part, and Sarah M. Bentley, of the county of Douglas and state of Illinois, party of the second part; Witnesseth, that,

Whereas, a marriage contract has been entered into by and between said parties; and,

Whereas, in pursuance of said marriage contract, a marriage is about to be solemnized between said parties; and,

Whereas, the said party of the first part is possessed of certain real and personal estate in said county, and a life interest in certain real estate in said county; and,

Whereas, the said party of the second part is also possessed of certain real estate and personal estate in said county; and,

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Whereas, each of said parties have living children by a former marriage; and

Whereas, all of said children are now adults; and,

Whereas, each of said parties desire to forever relinquish and discharge to the other, all right or interest of every kind or character which either may have or acquire in the estate of the other by virtue of such marriage, except the respective estate of homestead, if any; and except also, widow's award; and,

Whereas, the said John D. Murdock is desirous that the sum of fifteen hundred dollars (\$1,500) shall be paid to the said Sarah M. Bentley after his death in case he does not survive her, to assist her in supporting and maintaining herself, and that she shall receive said sum in case she survives him, in lieu of all her right and interest of every kind of character which she may acquire in and to his said estate, by virtue of such marriage, except her homestead right therein, if any; and except, also, her widow's award therein. Now,

Therefore, In consideration of the premises and one dollar in hand paid by the said party of the first part, the receipt whereof is hereby acknowledged, and in consideration of the covenant and agreements of the said party of the second part hereinafter set forth and contained, said party of the first part, for himself, his heirs and personal representatives, hereby covenants, bargains and agrees to and with the said party of the second part, her heirs and personal representatives, that in the event of his death leaving her surviving him, as his widow, there shall be paid to her out of his estate the said sum of fifteen hundred dollars (\$1,500), to be in lieu of all the right, interest or claim of every kind and character, except homestead, if any; and except, also, widow's award, which by virtue of said marriage she can or may acquire as widow, or heir, or otherwise, in and to any estate, real, personal or mixed, which ever has been, now is, or hereafter may be owned, acquired or possessed by him, the said party of the first part, and to be in full and absolute discharge of any and all such right, claim or interest,

except said estate of homestead and widow's award, which said party of the second part can, in any manner, by virtue of such marriage, or otherwise, acquire in and to any of said estate. The sum of fifteen hundred dollars to be paid to her by his executors or administrators within sixty days after said executors or administrators shall be qualified to act as such, and the receipt of the said party of the second part shall be sufficient voucher for the payment to her of said money for the purposes aforesaid;

And the said party of the first part, for the consideration aforesaid, also forever hereby releases, relinquishes and discharges all interest of every kind or character whatsoever, except his estate of homestead, if any, which by virtue of said marriage he can or may acquire as surviving husband or heir in and to any of the estate, real, personal or mixed, which ever has been, now is, or hereafter may be acquired, owned or possessed by the said party of the second part; and that he will at all times after said marriage upon request of said party of the second part, duly execute and acknowledge any and all such deeds of conveyance, mortgages, releases, trust deeds, or other instruments in writing as may be necessary and proper for the releasing, conveying, satisfying and discharging any and all of his interests, title or claim, whether as heir, owner, or otherwise of, in and to the estate, real, personal or mixed, of the said party of the second part, wherever the same may be situated;

And the said party of the second part, for herself, her heirs, executors and administrators doth covenant and agree to and with the said party of the first part, his heirs and personal representatives that in consideration of the covenants and agreements aforesaid of the said party of the first part, and the provision herein made by him for her use and benefit, that she will, and for the consideration aforesaid, she does hereby relinquish, release and discharge all her claim, right, or interest of every kind or character, except her estate of homestead, if any, and except, also, her widow's award which by virtue of said marriage or otherwise she can or may acquire as widow or heir, or otherwise, in and

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to the said estate, real, personal or mixed, of the said party of the first part, whether heretofore possessed or owned by him at the time of their marriage or acquired by him at any subsequent time and that she will receive and accept the aforesaid sum of fifteen hundred dollars (\$1,500) in lieu of and in full satisfaction and discharge of any and all such claims or interest except her estate of homestead and widow's award, if any, which by virtue of said marriage she can, or may acquire as widow, heir or otherwise in any of said estate of said party of the first part, so possessed, owned or acquired by him, or so now owned by him, or which he may hereafter acquire, as aforesaid;

And for the consideration aforesaid, the said party of the second part further agrees that at any and all times after said marriage, upon request of said party of the first part, she will duly execute and acknowledge all such deeds of conveyance, mortgages, trust deeds, releases, acquittances, or other instruments in writing as may be necessary and proper for conveying, releasing, satisfying, or discharging any and all interest, right, title or claim whether as owner, heir or otherwise, of, in and to any of the estate, real, personal or mixed, of any party of the first part, hereinbefore mentioned.

The true intent, object and meaning of these presents is to forever release, discharge, satisfy and relinquish all the claim, right, title and interests, except said homestead interests, if any, and except said widow's award, which each and either of said parties can or may, by virtue of said marriage as widow, surviving husband, or heirs or otherwise, acquire in and to any of the real, personal or mixed estate which ever has been, now is, or hereafter may be owned, possessed or acquired by the other, and to settle upon the said party of the second part the gross sum, being the sum last above mentioned, upon the terms and conditions hereinbefore stated, to stand, and to be instead of, for in lieu of all claims to, or interest, except her homestead interest, if any; and except, also, said widow's award, which said party of the second part might, could or would acquire in and to the estate

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of the party of the first part hereinbefore named, had this agreement and the covenants herein contained never been made or entered into.

In witness whereof, The said parties to this instrument have hereunto set their hands and seals, this 25th day of July, A. D. 1892.

JOHN D. MURDOCK, [SEAL.]
SARAH M. BENTLEY, [SEAL.]

STATE OF ILLINOIS, }
DOUGLAS COUNTY, } ss.

I, J. W. Hamilton, a notary public, in and for the said county in the state aforesaid, do hereby certify that John D. Murdock and Sarah M. Bentley, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instruments as their free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal, this 25th day of July, A. D. 1892.

J. W. HAMILTON,
Notary Public."

[SEAL.]

Some weeks previous to the execution of this paper they had agreed to marry, his children were strongly opposed to the marriage, Mrs. Bentley was aware of their opposition, and had urged Mr. Murdock to deed his lands to them in order to abate or remove their feeling of ill-will to her, and on July 16th he did make deeds of conveyance of his farm-lands to his children, separate parcels to each, but in all these deeds he reserved to himself the use of the lands during his life.

This bill is brought by defendant in error to set aside the above mentioned ante-nuptial contract. Answers and replications were filed and the cause referred to the master to take the proofs and make report. The master reported the evidence taken, his finding thereon, and recommended that

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the bill be dismissed for want of equity. The complainant filed exceptions to the several findings by the master some of which exceptions were overruled and some of which were sustained and the court entered its decree setting aside the ante-nuptial contract in so far as the personal estate of John D. Murdock is concerned and ordering "that the complainant have and take of the personal property of the estate of said John D. Murdock the widow's award as the same has been determined and allowed, and also such share and interest in the personal estate of the said John D. Murdock as she would have received or been entitled to under the law had no agreement ever been made between the complainant and the said John D. Murdock." Plaintiffs in error ask the reversal of that decree.

The general principles of law pertaining to ante-nuptial contracts have been very clearly established by the Supreme Court of this state. In substance they are: When man and woman become engaged to marry there arises between them out of such engagement a fiduciary relation which, when he thereafter asks her to execute a contract which shall absolutely fix her interest in the estate then held by him and thereafter to be by him acquired, requires the utmost frankness, fairness and truthfulness from him to her whom he has promised to make his wife, and if by any actual fraud, *suggestio falsi*, by him she be induced to make such a contract, or if by mere concealment, *suppressio veri*, by him she be thereto led, or if by mere failure to inform her of the nature, character and value of his estate, failure on his part without actual intent by him to conceal or defraud, she not being shown to have such information, she be led to execute such contract, or if the provisions and effect of the contract, if not shown to be known and understood by her be not fully explained to her so that it may be seen that her execution of the contract was with full knowledge of its effect upon her prospective interest in her promised husband's estate, she is not bound by such contract, the law deems it a fraud upon her. "After the marriage engagement is entered into the relationship between the parties is confidential, and the

intended wife is supposed to confide in the man to whom she is betrothed, to deal fairly and justly with her." *Hessick v. Hessick*, 169 Ill., 491. "Parties to an ante-nuptial contract occupy a confidential relation towards each other. While they may lawfully contract with each other, where there is full knowledge of all that materially affects the contract, yet where the provision secured for the intended wife is disproportionate to the means of the intended husband, it raises the presumption of designed concealment and throws the burden upon those claiming in his right to prove by satisfactory evidence that appellee had knowledge of the character and extent of her intended husband's property and of the provisions and effect of this instrument, or, at all events, that the circumstances were such that she reasonably ought to have had such knowledge at the time this instrument was executed." *Taylor v. Taylor*, 144 Ill., 445. The foregoing is quoted with approval in the *Hessick* case, *supra*, and it is there stated: "The rule announced in the *Taylor* case must be accepted as the settled law of this state."

It appears from the testimony of J. M. Hamilton, a witness for defendants, that he was a clerk in the law office of C. W. Woolverton at Tuscola and that Mr. Murdock went to Woolverton's office two weeks before the contract was executed and gave directions for its preparation and that he came alone. There is no proof in the record that Mrs. Bentley knew of that visit or its purposes or that any ante-nuptial contract was under consideration by him until on the day and at the time when it was executed at Woolverton's office. There is no proof that on the day the contract was executed anything was said to or in the presence of Mrs. Bentley concerning the nature, character, or value of Mr. Murdock's property then owned by him, either real or personal, except as it is described in the contract itself. There is no proof that Mrs. Bentley then knew the nature, character and value of his personal estate unless it is to be inferred from the facts that they lived very near each other in the same village and had so lived for quite a number of years and that he had generally been reported to be a wealthy

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man. Such proof is wholly insufficient. *Hessick v. Hessick, supra*. There is no proof that she knew that he had reserved his life interest in the real estate which he had conveyed to his children except as the contract states that he had a life interest in some real estate not described. The legitimate inference from the evidence concerning the conveyance of his lands is that she understood he had conveyed all his farm lands to his children in fee simple without reservation. The proof is that his personal estate at the time of making the contract was of the value from ten to fifteen thousand dollars and that the rents of his lands in which he reserved his life interest brought him at least the sum of four thousand dollars annually, and the proof is that his personal estate at the time of his death, nine years and some months after his marriage, was of the value of about thirty-five thousand dollars.

There is no charge in the bill of fraud on the part of John D. Murdock. The bill avers that he did not mean or understand that the contract would deprive complainant of her one-third interest in the personal estate he might have at his death and further avers "that said sum mentioned in said ante-nuptial contract is inadequate and disproportionate to the means of her said husband and unjust and fraudulent." It is the situation of the parties at the time the contract is made which the law requires to be taken into consideration. Mr. Murdock was then possessed of personal estate in the amount of from ten to fifteen thousand dollars and then was also the owner of an estate for his own life in eight hundred and seventy-five acres of farm land in Douglas county of a yearly rental value of at least five dollars per acre. Complainant then had no right or interest in said life estate nor could she at any time thereafter obtain any right or interest therein by virtue of the proposed marriage but it was a part of Mr. Murdock's then means and a very large part, bringing to him yearly the sum of four thousand dollars. He then was seventy-six years old but his health and strength were good and promised some years of life to come, a promise which was in fact kept good for the period of nearly ten years. We

see no reason in the law why Mrs. Bentley should not have been informed of that life estate and the moneys coming therefrom yearly. True, she had no actual right, interest or title in the life estate itself, neither had she any actual right, interest or title in any of his personal estate, but she was entitled under the law to full and fairly complete information of the actual estate and means and the actual and fixed sources of income by him then possessed both real and personal. We do not deem the fact that the life estate was of uncertain duration as any excuse or justification for the failure to give information thereof. She had right to the knowledge, and then with full knowledge, she could exercise her right to choose between the provision of fifteen hundred dollars in the contract and the provision made by the law. Nor does it operate against her that she understood that he had conveyed his lands without reservation. The fact was that he had not so conveyed them, that he still had his large source of income which in all reasonable expectation would largely increase his personal estate from year to year, and which was then worth in cash several thousands of dollars. The failure to inform her of this life estate interest was fraudulent in law. We deem it unnecessary to discuss the question whether the contract should be deemed inequitable, leaving out of consideration the matter of the life estate.

The bill also avers that there was no consideration for the contract, that the agreement to marry had been made long before the ante-nuptial contract was made and that marriage was no part of the consideration of that contract. The proof wholly fails to show that it was any part of this marriage engagement that an ante-nuptial contract should be entered into and that such a contract was then under consideration by either of them; but we do not understand that persons making an engagement to marry must at the same time and as a part of such contract to marry, agree upon the making of an ante-nuptial contract. An ante-nuptial contract may lawfully be entered into after the engagement to marry and as we suppose is generally so done. It is the mere fact that such engagement has been made, the fact of the relation so

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created that imposes upon the man the duty of absolute frankness, fairness and truthfulness above mentioned and upon those claiming under him the burden of proving that there was no failure on his part in those respects.

Plaintiffs in error state the following proposition: "The chancellor, being the judge both of the law and the evidence, the presumption is that in rendering his decree he will regard that which is legal and pertinent; and the chancellor should only consider such evidence as is material and legal in rendering a decree." We think that proposition states the law correctly.

They also state that complainant was an incompetent witness as to facts occurring prior to the death of John D. Murdock. We agree to that proposition under the conditions and circumstances shown in this case. They also state that it is apparent that the chancellor considered her testimony in reaching his conclusions. The complainant was not a witness upon her case in chief but in rebuttal she gave some testimony which was not competent to be heard in support of the averments of her bill. It is not claimed by her counsel that it is competent for that purpose but that it is competent for the purpose of impeachment. It is not apparent to us that her testimony was considered for any purpose, but whatever the view of the trial court may have been as to the competency of her testimony our conclusion is that, rejecting it all for any purpose, the evidence remaining warrants and requires the decree which was rendered.

The decree is just and in accordance with the law and will be affirmed.

Affirmed.

MR. JUSTICE BAUME, dissenting.

**C., P. & St. L. Railway Company v. T. J. Condon,
administrator.**

1. **PEREMPTORY INSTRUCTION**—*what considered upon motion for.* Upon such a motion only evidence tending to prove the plaintiff's case is considered; and it matters not from which party to the cause the evidence comes; nothing in rebuttal of plaintiff's case is to be considered; there is to be no weighing of proof on the respective sides.

2. **VERDICT**—*what does not destroy presumptions in favor of.* The presumptions which prevail in favor of the verdict of a jury are not destroyed by reason of the fact that the verdict in question was predicated solely upon evidence heard by another jury at a former trial and read upon the latter one from a transcript thereof.

3. **IMPUTED NEGLIGENCE**—*doctrine of, abolished.* The doctrine of imputed negligence no longer exists in this state, and especially would it not apply as between two persons traveling together in a buggy who sustained toward each other no other relation than that of common excursionists.

Action on the case for death caused by alleged wrongful act. Error to the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the November term, 1904. Affirmed. Opinion filed June 7, 1905.

WILSON, WARREN & CHILD, for plaintiff in error.

SHUTT & GRAHAM, for defendant in error.

MR. JUSTICE GEST delivered the opinion of the court.

This suit is brought under chapter 70 of the Revised Statutes charging negligence by plaintiff in error whereby the death of Alexander Moore was occasioned. Moore came to his death September 19, 1901, between 8:30 and 9 o'clock P. M. by reason of a collision between a freight train of appellant and a conveyance in which Moore was riding. The train was backing eastward on Madison street in Springfield and at the intersection of that street with 11th street the accident happened. The first count of the declaration charges that the appellant negligently backed its train down Madison street and upon 11th street without giving any notice of its approach and struck the buggy on the crossing. The fourth

count avers failure to continuously ring the bell on the engine as required by an ordinance of Springfield. The fifth count avers failure to have a conspicuous light at the rear of the train so as to show the direction the same was moving, as required by an ordinance of the city. The ordinance set out in the fourth and fifth counts and which was duly proven is as follows: "The bell of each locomotive engine shall be rung continually while running upon any railroad track within said city; and every locomotive engine, car or train of cars, running in the night time on any railroad track in this city, shall have and keep a bright and conspicuous light at the forward end of such locomotive engine, car or train of cars. If such engine or train be backing, it shall have a conspicuous light at the rear of the engine or train, so as to show the direction the same is moving." It is unnecessary to mention the other three counts of the declaration. The cause was submitted to a jury who found for the plaintiff and assessed the damages at \$3,000 and the court entered judgment on the verdict. At the close of all the evidence the defendant moved the court to instruct the jury to find the defendant not guilty but the court overruled the motion.

The grounds for reversal that are presented by counsel for appellant in their argument are, that the verdict is contrary to the evidence; that the court should have sustained their motion to instruct the jury to find for the defendant; that the court erred in giving the first instruction given for plaintiff; that the court erred in refusing to give defendant's instructions one and two. The first two grounds above stated require consideration of the evidence presented upon the trial. It is exceedingly difficult, if not impossible, to state the substance of the material evidence contained in a record so as to convey to a third person that full force of the evidence which is obtained by the reading of the whole. No two persons will state it in like manner or with the same effect.

Moore and one James Tabor lived at Athens, a place distant from Springfield about fifteen miles, and were at this time of the same age, twenty-one years. They left Athens

together September 19, 1901, about three o'clock P. M. and reached Springfield about five o'clock that afternoon; they came in a one-seated buggy drawn by two horses; Tabor drove all the time; the buggy and one of the horses belonged to Tabor, the other horse belonged to the man for whom he worked. Whether Moore or Tabor obtained the use of it on this occasion does not appear; both horses were what are called roadsters. On reaching Springfield the team was put in Myers' feed yard; Moore and Tabor remained together until they started back to Athens; they walked about the streets, talked with people they met and knew, "bummed around the square," got a bowl of soup, Moore bought a pair of shoes and in the second saloon that they visited a quart bottle of blackberry wine which was found in the inside pocket of his undercoat after the accident. They got their team again at about half past eight, drove around the square and a little on other streets, out to 11th, north on 11th to Madison where Moore was killed on the crossing.

They had been associated for years. Moore had been a coal miner for five years and had worked about livery stables. Tabor was a laborer, had worked on farms, in livery business, in company barns, and in breaking horses. There is direct evidence that they each drank on this day of intoxicating liquor three glasses of beer and no more, and there is no direct evidence that they drank any more; the last glass of beer they drank was one or two hours before they started home. Three witnesses for defendant testify that on this afternoon Tabor was drunk. Two of these witnesses were trainmen on this train; one of them says Tabor was drunk because he smelled liquor on his breath, the other simply says that Tabor was drunk, and the third, Henderson, who was hostler at the feed yard, says both Moore and Tabor were drunk when their team was hitched to start home. Henderson's character for veracity is impeached by his employer and three other witnesses. Four witnesses for plaintiff besides Tabor testify that neither Tabor or Moore was drunk but that both were sober shortly before they started for home, and it appears both were accustomed to the use

of beer. As they approached the crossing, going north, the top of the buggy was up with side curtains on; Tabor sat on the right side driving; both had their overcoats on and a lap robe over them; it was a dark, foggy, cloudy night with drizzling rain. Tabor says that as he drove north they were going at about nine miles an hour. Warner, a witness for plaintiff, says he kept store on the southeast corner of 11th and Madison streets at that time, stood in his door as the buggy passed along, that the team then was jogging along, not going fast and not on a walk. When they were half a block from the crossing, the B. & O. passenger train went over the crossing and Moore remarked, "There goes a passenger." Tabor says he kept looking out and driving on; that when the horses were about fifteen feet from the track he looked east and when the team was pretty near on to the track he looked east again and then west, heard a grumbling sound and saw a box car ten or fifteen feet to the west and coming east and the team was then upon the tracks. He struck the team with the whip, they jumped and broke the doubletree, pulled him out and over the dash board and the car passed over the buggy and Moore, killing him instantly. Tabor says that Moore sat on the side next to the box car and does not think that Moore looked at all; that Moore was sitting back with one arm about him and the other under the lap robe and the last he said was: "There goes a passenger"; that his hearing is good and no bell was rung, or whistle sounded or other warning given of the approaching train as far as he could tell; that there was no light at the end of the box car; that he looked and all he could see was the end of the car, saw no light at all; that there was no electric light at that street corner; that the passenger train they saw consisted of one engine and three coaches which was running west on the north track and was out of sight when they reached the crossing, and that the freight train which struck the buggy was running on the south track. There were eighteen or nineteen cars in this freight train averaging thirty-six feet each in length, making a train about seven hundred feet long; it was running eastward; the

engine was at the west end. There were five men on the train, the engineer Robinson, the fireman, Byrum, who were on the engine; Porter, a brakeman, and Shadow, foreman of the crew, concerning whose location on the train there is some ground for question. Porter was not a witness; he is dead. Shadow says that he and Porter were on the east end of the east car with switch lanterns in their hands which they were using for signals. Robinson, Byrum and Corbely, located about seven hundred feet away from the east car, say that Shadow and Porter were on the east car with switch lanterns. Witnesses for plaintiff, Tabor, another Robinson, Burton and Warner say that there were no lights on the east car. Warner, Robinson and Burton were on the ground standing in different spots not more than forty or fifty feet from the east car. Shadow did not see the team or buggy. One horse was gray, the other sorrel. The first knowledge he had of team or buggy was when he saw the gray horse passing north of the car and heard the grinding of the buggy under the wheels. He did not see the sorrel horse or the buggy, it was too dark to see them, all he saw was "just that white horse."

In argument of the alleged error of the court in denying appellant's motion to instruct the jury peremptorily to find for the defendant, counsel for appellant say: "The question is whether the evidence as a whole tends to prove plaintiff's claim; it is not enough that some evidence for plaintiff may be found in the record; there must be such evidence as ought reasonably to satisfy fair-minded men that plaintiff's case has been established by a preponderance." We do not so understand the law. Such a motion at the close of the evidence raises merely the question whether any evidence has been presented tending to prove a case for the plaintiff. Upon such a motion only evidence tending to prove the plaintiff's case is to be considered, and it matters not from which party to the cause the evidence comes. Nothing in rebuttal of plaintiff's case is to be considered, there is to be no weighing of proof on the respective sides. Such a motion is merely a demurrer to the evidence and demurrer admits all the

facts which the evidence favorable to the plaintiff proves or by reasonable inference tends to prove. We think the court committed no error in refusing the peremptory instruction.

Whether the verdict is contrary to the evidence is a question which requires consideration of all the evidence in the case. The cause has been several times tried. It was in this court two years ago and the judgment reversed for error in an instruction given for plaintiff. On the last trial, as appears by the bill of exceptions, no witnesses were heard by the jury but by agreement of parties the evidence heard on a previous trial was read to the jury in lieu of calling witnesses, and that fact is suggested to us as ground for placing less confidence in the verdict. Parties have the right to try causes in that way, but when they do, we are not disposed to depart from the usual rule applied to jury trials. One reason for the rule that the verdict of a jury is entitled to weight is ordinarily stated to be because they see and hear the witnesses, but that is far from being the only ground for the rule that the verdict of twelve men from the various walks of life is entitled to great consideration in both the trial courts and courts of review. It is urged that Moore personally was not exercising ordinary care, that he was guilty of negligence. After careful consideration of all the evidence we are not disposed to disturb the verdict on that ground. It is also urged that there is no proof of negligence on the part of defendant. The error in one of plaintiff's instructions which caused the reversal of the judgment in this cause by this court on its former hearing was in advising the jury as matter of law "that a railroad man's common lantern in the hands of a person on the top of a moving box car at the end of a backing train farthest from the engine is not a compliance with an ordinance which requires that a backing train shall have a conspicuous light at the rear of such train so as to show the direction in which the same is moving." This court on that hearing held, and whether rightly or wrongly is of no significance on this hearing, that the determination of that question was matter of fact to be determined by a jury and not matter of law for the court.

On the present trial that question was left to the determination of the jury by an instruction on behalf of appellant and we conclude that the jury found the defendant negligent for want of compliance with that ordinance. Our conclusion from the evidence is in entire accord with that finding of the jury, and discussion of the evidence bearing upon that subject is wholly unnecessary. It remains to consider the alleged errors in giving and refusing instructions. The first instruction given for plaintiff and of which complaint is made by appellant is as follows:

"The court instructs you that if you believe from a preponderance of the evidence in this case that Alexander Moore, deceased, was killed through the negligence of the defendant, as charged in either the first, fourth, or fifth counts of the declaration, and that he was in the exercise of due care and caution for his own safety on the occasion and at the time of such injury, then you will find your verdict for the plaintiff and assess plaintiff's damages at such sum as in your judgment under the evidence bearing upon that question will compensate the next of kin for the pecuniary loss sustained by them, if any, on account of the death of said Alexander Moore."

The first refused instruction offered by appellant, the refusal of which is urged as error, is as follows:

"The court instructs the jury that if you believe from the evidence that deceased, at or just prior to the time of the injury had by voluntary use of intoxicating drinks, become physically helpless, or had thereby so stupefied himself so that he was unable to care for himself, and if you further believe from the evidence that while deceased was in such condition, that said James Tabor undertook to care for him and carry him from Springfield to Athens in the buggy he was driving and was so undertaking at the time of the collision, then before plaintiff can recover in this case you must believe from a preponderance of the evidence that in approaching and attempting to cross said railroad tracks, said James Tabor was in the exercise of that degree of caution for the safety of deceased, which an ordinarily prudent, sober

and cautious man would have exercised for his own safety, under all the circumstances in evidence; and if you further believe from the evidence that said Tabor negligently failed to exercise such care and caution, and that such failure on the part of Tabor contributed to the cause of the death of deceased, then plaintiff cannot recover in this case, and in such case you must find defendant not guilty."

And the second is as follows:

"The court instructs the jury that if you believe from the evidence that at the time of the collision deceased had voluntarily placed his safety in the care and control of said James Tabor and permitted said Tabor to drive the horses drawing the buggy in which he was riding, before the plaintiff can recover in this case you must believe from the preponderance of the evidence, that in approaching and attempting to cross said railroad track James Tabor was in the exercise of that degree of care and caution for the safety of deceased which an ordinarily prudent and cautious man would have exercised for his own safety under all the circumstances in evidence, and unless you do so believe from a preponderance of the evidence you must find the defendant not guilty."

It is argued that the first above instruction for plaintiff is erroneous in that it omits the subject of Tabor's alleged negligence of which it is claimed there is proof sufficient to require its submission to the jury, and which it is also claimed as matter of law under the evidence in the case, is to be imputed to Moore. No other complaint against the instruction is made. The ground stated by appellant upon which negligence of Tabor should be imputed to Moore is that they planned a joint excursion to Springfield for mutual pleasure, that in all their movements they consulted the pleasure of each other, that as to the mere physical act of managing the horses Moore had submitted his physical safety to Tabor, that Moore had joint control with Tabor over the vehicle and it is also stated in italics "While Tabor was driving and he received and executed the directions of Moore" in driving, of which there appears to be no evidence

whatever. Upon these grounds counsel say: "The theory of the defense is that such facts constituted a relation between Tabor and Moore which rendered the negligence of Tabor in the management of the horses imputable to Moore." As before stated the buggy and one horse belonged to Tabor, and the natural inference from the evidence is that Tabor was the person who obtained the other horse from his employer. Tabor was driver all the time. If there be any basis in the evidence for the imputation of negligence by Tabor to Moore it must arise out of some relation existing between them. It is difficult to understand what counsel mean by joint control. There cannot well be joint control of a team while it is going; the driver must then control. Joint control is one thing and equal right to control is another. Suppose that the team and buggy were jointly owned by Moore and Tabor; there would be equal right to control; and suppose under such conditions that Tabor was driving, a contract implied by the law immediately arose requiring Tabor to use reasonable care for the safety of Moore, and if Tabor by his negligence violated that contract and Moore was thereby injured a cause of action immediately arose in Moore's favor against Tabor. If Moore owned the entire right or if Tabor owned it and Tabor was driving, the same duty and liability would arise. If Moore were the master and Tabor the servant the same implications would arise, and if, under any such circumstances Moore was injured by the joint operation of Tabor's negligence and appellant's negligence both Tabor and appellant would be liable to Moore for the injury. Moore was bound to use due care for his own safety; if he was guilty of negligence in any of the ways in which it could be manifested and which contributed to his death there could be no recovery in this case, but in some form Moore himself must be guilty of negligence. If, for instance, Tabor were drunk at the time and his drunkenness caused him to be negligent and thereby Moore was killed, and Moore knew of his drunkenness and consequent unfitness to drive or in the exercise of reasonable care should have known it, then Moore would

be guilty of negligence in riding with such a driver, but his negligence would be his own, not Tabor's imputed to him. Other illustrations of like character and effect will occur to any lawyer. A wholly different question would arise if while they were riding together under any of the supposed conditions a person on the highway was run over by the team by reason of the negligent driving and thereby injured. In such case if Moore were master and Tabor servant, Moore as master would be liable to the person injured and by reason of the imputation of Tabor's negligence to him. There is no such doctrine known to the law of this state as imputation of negligence except in the one case of injury to a third person by the servant of another; in such case the master is held liable, the servant's negligence is imputed to the master, however innocent the master himself may be, and that upon grounds of public policy. The doctrine is generally known under the phrase *respondeat superior*. The doctrine of imputed negligence arising out of the relation of parent and child, husband and wife and other relations of care and custody of the person of another at one time had some recognition in this state, but it has been entirely abandoned, completely exploded. *Chicago City Railway Co. v. Wilcox*, 138 Ill., 370; *C. & A. R. R. Co. v. Vipond*, 212 Ill., 199. The claim of error in refusing the two instructions offered by appellant and above quoted is based by appellant's counsel upon the same theory of imputation of negligence. They are both objectionable on other grounds but no necessity arises for their further discussion.

Perceiving no error in this record the judgment will be affirmed.

Affirmed.

The Commissioners of Spoon River Drainage District in Champaign County v. J. P. Conner, et al.

1. **BENEFITS—*what deemed to establish.*** Where lands sought to be attached to a drainage district have already been tiled, but not with such success as to prevent overflow and inundation, if the effect of their connection with the drainage district is to decrease such overflow and diminish and more effectually remove the inundation, benefit will be deemed to have been established.

2. **DRAINAGE DISTRICT—*what lands are subject to annexation to.*** Lands benefited by the work of a drainage district are subject to be attached thereto without regard to their natural conditions.

Petition to annex various tracts of land to drainage district. Appeal from the Circuit Court of Champaign County; the Hon. SOLON PHILBRICK, Judge, presiding. Heard in this court at the November term, 1904. Reversed and remanded. Opinion filed June 21, 1905.

RAY, DOBBINS & RILEY, for appellants.

A. E. BERGLAND and JOHN J. REA, for appellee.

MR. JUSTICE GEST delivered the opinion of the court.

The commissioners of Spoon River Drainage District filed their petitions in the County Court of Champaign county to annex to that district one hundred and thirty-eight different tracts of land belonging to about one hundred different owners. The County Court granted the petitions as to some of the tracts and forty-eight of the owners of such tracts severally appealed to the Circuit Court where the appeals were consolidated and heard together.

The petition is brought under section 58 of the act commonly designated as the Drainage and Levee Act of May 29, 1879, as amended by the act of 1885 which provides: "Any land lying outside of the drainage district as organized, the owner or owners of which shall thereafter make connection with the main ditch or drain or with any ditch or drain within the district as organized or whose lands are or will be benefited by the work of such district shall be deemed to have made voluntary application to be included in such drainage district: and thereupon the commissioners

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shall make complaint," etc., to the end that such lands may be attached to the district. The objection filed by each land owner is, "that his land is not now and will not be benefited by the work of said drainage district." Upon the hearing in the Circuit Court the petition was dismissed at the costs of the commissioners and execution was awarded against them therefor. More than fifty witnesses were examined upon the hearing. We do not propose to determine from the evidence in this record the question of fact as to each of the several tracts of land whether it is or will be benefited by the work of the district. Ordinarily when questions of fact arising in a cause are passed upon in the trial court under erroneous views of the law applicable thereto the cause should be re-submitted to that court. It will suffice in this case to express our views upon the questions of law which are presented.

The petitioners submitted to the court two propositions which they requested to be held as the law of this case upon the issue made by the objections filed. The court refused to hold them as offered but modified them and held them as modified. They are as follows, the parts stricken out by the court being in brackets and the parts inserted being in italics:

First. "(If the evidence shows that all of) *when* the lands of the objectors are drained by artificial ditches each of them connecting with and draining through the ditches of the lower lands, and (that) all the branch ditches of objectors are continuous artificial ditches connecting with the Spoon river ditch, and (that) said Spoon river ditches have been constructed by objectors and other adjacent land owners to south side of Section 26, Town 21, North, Range 10, East, at the point where the ditch of the drainage district commenced, and at that point the outlet of the ditches of objectors is not sufficient for good drainage *for the lands so artificially drained*, and the water spreads out and flows over (adjacent) *objectors'* lands, and the ditch proposed to be constructed and now established by said district will fur-

nish an outlet for the waters so received from the lands of objectors and others lying above, *and prevent such overflow*, then all the lands of objectors so draining will be benefited."

Second. "(If the evidence shows that) *when* the objectors and adjacent land owners have constructed a system of drainage through each other's lands to the point where the commissioners commence their ditch, and the outlet of said system of drainage so established by objectors and adjacent land owners is not sufficient *for their lands* and the drainage *proposed to be* established by the commissioners and now being constructed will furnish (such) *a sufficient* outlet, then all the lands of objectors draining into that system and to that outlet will be benefited even though the water may pass off the lands of objectors through the lands of objectors."

The defendants submitted three propositions upon the issue made, all of which were held by the court, and are as follows:

First. "That the owners of higher lands have the right to discharge the water collecting on, or coming over their lands, on to lower lands, through the natural courses, without laying themselves liable to be annexed to said drainage district."

Second. "The owners of higher lands have a right to tile their lands into natural water courses on their own lands and thereby discharge the water of such higher lands upon the lower lands, without becoming liable to be annexed to drainage district, provided that by so doing, the owners of such higher lands do not thereby divert any of such water from its natural course or artificially attach their lands to the ditches of such drainage district."

Third. "That the owners of higher lands have a right to discharge the water collecting on or coming over their lands on to lower lands through the natural water courses, and for the purpose of securing better drainage for agricultural purposes, they have the right to tile their lands into the water courses that nature has provided thereon, and to

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clean out, deepen or widen said natural water courses on their lands, even if by so doing the water is discharged on to lower lands as aforesaid in greater quantity and with greater rapidity than in a state of nature, provided said water is not diverted from its natural courses by tiling or ditching as aforesaid."

It appears to be assumed by both the petitioners and the defendants that the test of benefits is the question whether drainage is needed and furnished and the degree to which it is furnished.

It is claimed by the defendants and the evidence tends to show that the lands of the defendants naturally lie higher and above the lands in the district and that water on defendants' lands by reason thereof flows towards and upon the district lands, that is, that the defendants' lands are the dominant and the district lands the servient. It appears that the defendants among themselves have tiled and ditched their lands towards the district lands and it also appears that notwithstanding the work done on their lands the water heretofore has overflowed their ditches and stood upon their lands at considerable depth and for considerable time and that this condition exists by reason of lack of outlet. It is claimed by the commissioners that the district work will to a great extent remove from the defendants' lands this overflow and thereby benefit their lands. The sense of the first proposition offered by appellant is not materially changed by any of the modifications made by the court except the last, the insertion of the words "and prevent such overflows." As modified by those words the proposition signifies that unless the district work would wholly prevent any overflow of the defendants' lands no benefit could be deemed to arise to them therefrom. It seems clear that although the district work might not prevent overflow yet if it so expedited the outflow of the water as materially to lessen the period of submergence of the lands it might well be a benefit to them and surely would be if after overflow of the lands the water was carried off rapidly enough to prevent destruction of crops

or otherwise render lands tillable or more useful for agricultural purposes than they were before. Absolute prevention of overflow would not seem to be necessary in order to the reception of benefits. We think the court erred in making that modification of the proposition.

We find no error in the modification made by the court to appellants' second proposition. We see no substantial difference between the proposition as offered and as modified and the law is correctly stated therein, but we are not able to harmonize this proposition with propositions one, two and three offered by the defendants and held as the law. These propositions are mere statements of the common law rule concerning the relation existing between estates dominant and servient. Section 58 of the Drainage Act has made innovation upon the common law. By it lands outside of an established district which "are or will be benefited by the work of such district" may be attached thereto dominant or servient, and it is made the duty of the commissioners to see to it that they are attached. The substance of these three propositions of the defendants is that dominant lands may not be attached to a district the lands of which are servient to them unless the owners thereof have artificially attached them to the ditches of the district. These propositions do not correctly state the law. They are contrary to the express provisions of the statute. Lands benefited by the work of a drainage district are subject to be attached thereto without regard to their natural conditions. The sole question in this case and in all like cases is: Are or will the lands sought to be attached be benefited by the work of the district?

For the errors of law above mentioned the judgment of the Circuit Court is reversed and the cause remanded for another hearing in accordance with the views herein expressed.

Reversed and remanded.

**Chicago, Burlington & Quincy Railroad Company v.
Arthur Weber, administrator.**

1. EVIDENCE ACT—*sections 15 and 16 construed.* It would seem that the scope of these sections is to authorize the admission in evidence of copies of the record of the acts and proceedings of the board or body of officers charged by law with the conduct of the business of the corporation in such matters, and such matters only, as by law are provided or required to be acted upon by such board or body. It is merely the action of such board or body on such matter which when committed to the "paper, entry or record" may be proven by duly certified copy of such paper.

2. CERTIFIED COPIES—*of corporation contracts incompetent.* Copies of contracts made by a corporation with some other person or corporation when certified to by the secretary of such corporation are incompetent as against a third party.

3. PECUNIARY LOSS—*instruction as to, in action on the case for death caused by alleged wrongful act, criticised.* An instruction as follows: "The court instructs the jury that if they find the issue upon the plea in abatement against the defendant under the evidence and the instructions of the court, then it is their duty to assess the plaintiff's damages, and in assessing the damages they have a right to take into consideration all of the testimony bearing upon that question, and allow such damages as they may deem a fair and just compensation, with reference to the pecuniary injuries resulting from the death of the plaintiff's intestate to his widow and next of kin; and in estimating the plaintiff's damages they have a right to take into consideration whatever they may believe, from the evidence, the widow and next of kin might have reasonably expected, in a pecuniary way, from the continued life of the intestate. And, further in determining such pecuniary loss, the jury may, also, take into consideration the mental and physical capacity of the said Frederick Weber, his habits of industry and frugality, his means, opportunities and sobriety, the amount of his usual earnings, his prospects of life, and what he might in all probability earn and add to his estate, if all these means of information have been proved by the evidence, and from all these various sources of information, if proved by the evidence, in addition to the other above enumerated in this instruction, fix and estimate such amount of damages as in the best judgment of the jury will be a true and adequate compensation to the widow and next of kin of said deceased for whatever pecuniary loss they have sustained by reason of his death, not ex-

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ceeding the amount claimed in the declaration,"—is criticised in the use of the word "means," but *held*, not ground for reversal.

Action on the case for death caused by alleged wrongful act. Appeal from the Circuit Court of Adams County; the Hon. ALBERT AKEES, Judge, presiding. Heard in this court at the November term, 1904. Affirmed upon *remittitur*. Opinion filed July 10, 1905. *Remittitur* filed and judgment affirmed July 11, 1905.

JOSEPH N. CARTER and MATTHEW F. CARROTT, for appellant; CHESTER M. DAWES, of counsel.

VANDEVENTER & WOODS, for appellee.

MR. JUSTICE GEST delivered the opinion of the court.

Appellee brought this suit charging appellant with negligently causing the death of Frederick Weber on the 16th day of July, 1903, while he was driving on a highway across the appellant's road in Adams county. The writ of summons bears date September 29, 1903, and the return of the sheriff on the summons was, to-wit: "Not being able to find the President of the within named, the Chicago, Burlington and Quincy Railroad Company, I have served the within summons on the within named, the Chicago, Burlington and Quincy Railroad Company, by reading the same and delivering to E. F. Bradford, agent of the said the Chicago, Burlington and Quincy Railroad Company, a true copy of the within this 2nd day of October, 1903." The defendant filed its duly verified plea in abatement averring that at the time of the supposed service of said summons upon the defendant said Bradford was not the agent of defendant at Quincy or elsewhere. Issue was made on that plea and this is the only issue made in the cause. Trial was had by a jury, the issue was found for the plaintiff, plaintiff's damages were assessed by the jury at \$6,000 and the court after overruling a motion for a new trial entered judgment upon the verdict.

The first question presented for our determination is whether the verdict of the jury upon the issue presented by the plea in abatement should be sustained. The record shows

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that the Chicago, Burlington and Quincy Railroad Company was and is by that name duly incorporated under the laws of Illinois, and also shows that the Chicago, Burlington and Quincy Railway Company was in October, 1901, duly incorporated under and in pursuance of the laws of Iowa with a period of existence of fifty years. The record also shows a copy of a lease from said railroad company to said railway company appearing to have been made November 20, 1901, and which in substance is as follows:

Article I declares that the lessor owns railway lines, situated in the States of Illinois, Iowa, Missouri, Wisconsin, Minnesota, Nebraska, Wyoming, South Dakota and Montana, of the aggregate length of 5,443.92 miles, with stations, yards, sidetracks, shops and other usual appurtenances of railways; and an equipment of engines, cars, machinery, tools and furniture for the maintenance and operation of said railways.

It next declares that the lessor holds leases for terms of long future duration of other lines of the length of 2,265 miles, with stations, etc.

In Article II the lessor leases to the lessee all of said lines owned by the lessor together with its rights, privileges, franchises, right of way, grounds, yards and stations, sidetracks, shops and machinery, tools, implements, etc. (describing different kinds of property of the lessor company), for a period of 99 years.

The lease further provides that the lessor sublets to the lessee all its leased lines, and property used to operate the same.

The lease also provides that during the term of the lease the lessee shall operate the leased railways in a prudent, diligent and faithful manner and so as to furnish reasonable accommodation to the public.

Section 6 provides that the lessee may make all betterments of and additions to the track, structures and plant of the railways leased, that may be required by public authority or that in its own judgment may be necessary or desirable in handling the traffic over said railways.

Section 13 states that the lessor hereby sells and transfers to the lessee all stocks of fuel and materials of all kinds on hand for use or consumption in maintaining or operating the railways leased; and all contracts for the purchase of such fuel or materials unfulfilled at the date of the lease; and lessee assumes all obligations of the lessor under such contracts and shall hold the lessor harmless on account of same.

Section 14 states that the lessor leases and assigns to lessee all other real and personal property not before mentioned and all the rights, privileges, immunities and franchises of lessor, except its franchise to be a corporation.

Article III of said lease provides for the compensation to be paid for such lease.

Article VI provides that the lessee shall provide offices for the lessor in the cities of Burlington, Iowa, and Chicago, Illinois, and that the lessee shall at all times permit the lessor's agents and officers to have free access to all such railways and other property.

Article VII provides for forfeiture of the lease for failure by the lessee to comply with its conditions.

The copy appears to be certified by T. S. Howland as secretary of the said railroad company who certifies under his signature and the seal of the company that he is the keeper of the papers, entries and records of said company and of its corporate seal and that the paper is a true and correct copy of said lease as the same appears from the original in his office remaining. The record also shows what appears to be a copy of a supplemental lease from said railroad company to said railway company which is certified in like manner by said Howland and bears date of November 20, 1901.

E. F. Bradford on behalf of the defendant testified that he was the person on whom the writ of summons was served as the agent of the defendant. He testified that he had been the general agent at Quincy of the defendant from November 1, 1887, until December 21, 1901, on which last named day he received the following circular letter:

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CIRCULAR NO. 1.

CHICAGO, BURLINGTON & QUINCY RAILWAY
COMPANY.

OFFICE OF THE PRESIDENT.

Chicago, Ill., December 16, 1901.

This company has taken over, as lessee, and will operate, the railways and other properties owned and otherwise controlled by the Chicago, Burlington & Quincy Railroad Company. The officers and other employees of the Chicago, Burlington & Quincy Railroad Company, and the several companies subordinate thereto, will be retained by this company in the same positions as now occupied, with like authority and duties and at the same rates of pay.

GEO. B. HARRIS, President.

That on the 21st day of December, 1901, upon the receipt of that circular he ceased to be the agent of the railroad company and since has been the agent of the railway company; that the stamp he used in his office was changed to read railway company instead of railroad company and with that he stamped the folders and other printed matter in his office to read railway company instead of railroad company; that the employees of the railroad company were transferred to the railway company at the same time and in the same way; that the day agent and night agent, the day ticket agent and the night ticket agent, the freight agent, in short, all agents and employees remained just the same as before, the only difference being that the business was conducted in the name of and remittances of money were made to the railway company instead of the railroad company. Two other witnesses for defendant, Alvin C. Anders, freight agent, and A. S. Ellis, ticket agent at Quincy, testified substantially to the same matters. The plaintiff in due form objected to all the evidence so offered and specifically objected to the copies of leases on the ground that they were not the best evidence, were not the original documents, but the court overruled the objections and plaintiff duly excepted. Cross-error is as-

signed by appellee upon the ruling of the Circuit Court admitting the copies of leases. Doubtless the copies of leases above mentioned were deemed to be admissible in evidence under and by virtue of sections 15 and 16 of chapter 51 of the Revised Statutes concerning Evidence and Depositions. What the precise signification of the words "papers, entries and records" as used in that statute may be it is not deemed necessary to determine. It would seem that the scope of that statute is to authorize the admission in evidence of copies of the record of the acts and proceedings of the board or body of officers charged by law with the conduct of the business of the corporation in such matters and such matters only as by law are provided or required to be acted upon by such board or body. It is merely the action of such board or body on such matter which when committed to the "paper, entry or record" may be proven by a duly certified copy of such paper, entry or record.

The secretary of the railroad company certifies to no record of acts or proceedings of the board of directors of the company. He simply certifies "that he is the keeper of the papers, entries and records of said company and of its corporate seal and that said lease is a true and correct copy of said lease as the same appears from the original in his office remaining." Whether the views above expressed be correct or not, it appears clear that the statute does not authorize the admission in evidence of certified copies of mere contracts between parties. If this were a suit between the railroad company and the railway company the certified copies of leases would not be admissible; much less are they admissible against the public, one not a party thereto, as in this case. If these copies are admissible in this case, no reason is perceived why any and every private contract entered into by a corporation may not be by it proven in like manner, the production of the original be entirely dispensed with, and thereby one of the strongest safeguards of the rights of persons be completely destroyed. Manifestly no such power or privilege was intended to be granted to corporations. The construction of these sections of the statute

arose in the case of Chicago, Wilmington and Vermilion Coal Company v. Moran, 210 Ill., 9, and it was there held that contracts between parties are not within the meaning of the words "papers, entries and records." The cross-error is well assigned. The court erred in admitting in evidence the copies of leases. Striking that evidence from the record there remains no competent proof of any leasing by the railroad company to the railway company. The railroad of the railroad company was in active operation upon the day or at the time when the summons was served. The witness Bradford for many years previous to December 21, 1901, had been acting as agent at Quincy for the railroad company. From that date to the time of this trial he continued to occupy the same office premises, to do the same work and exercise the same powers and authority as theretofore. It must be presumed that he so continued with the knowledge of the defendant railroad company.

A railroad was in actual operation under the franchise granted to the defendant. The defendant was charged by law with the duty of operating that road. In the absence of proof of the alienation by it, in some manner authorized by law, of its corporate franchise to operate its railroad, public policy will not permit the defendant to deny that it was operating its road, or that Bradford was its agent at the time this writ was served. It follows necessarily that the summons was duly served, that the verdict and judgment upon the issue made by the plea in abatement were correct.

The court gave to the jury the following instruction:

"The court instructs the jury that if they find the issue upon the plea in abatement against the defendant under the evidence and the instructions of the court, then it is their duty to assess the plaintiff's damages, and in assessing the damages they have a right to take into consideration all of the testimony bearing upon that question, and allow such damages as they may deem a fair and just compensation, with reference to the pecuniary injuries resulting from the death of the plaintiff's intestate, to his widow and next of kin; and in estimating the plaintiff's damages they have a right

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to take into consideration whatever they may believe, from the evidence, the widow and next of kin might have reasonably expected, in a pecuniary way, from the continued life of the intestate. And, further in determining such pecuniary loss, the jury may, also take into consideration the mental and physical capacity of the said Frederick Weber, his habits of industry and frugality, his means, opportunities and sobriety, the amount of his usual earnings, his prospects of life, and what he might in all probability earn and add to his estate, if all these means of information have been proved by the evidence, and from all these various sources of information, if proved by the evidence, in addition to the other above enumerated in this instruction, fix and estimate such amount of damages as in the best judgment of the jury will be a true and adequate compensation to the widow and next of kin of said deceased for whatever pecuniary loss they have sustained by reason of his death, not exceeding the amount claimed in the declaration."

The giving of this instruction is assigned as error. The particular objection made to it is the use of the word "means." The evidence shows that the deceased was the owner of considerable property, that he and his family had accumulated it with hard work, that his family consisted of wife and six children, five of whom were boys; that four of the boys were of ages from twenty-two to twenty-nine years and one was fifteen, the daughter was nineteen; that all the children lived at home, were unmarried and worked without wages; that the deceased was sixty-two years of age at his death and had always been a sober, healthy and industrious man; that the family made from one to three thousand dollars a year upon the farm of deceased consisting of two hundred and fifty-five acres; that the services of each of the adult boys were worth two hundred dollars per year besides board, clothes and "spending money."

If the deceased had been shown to be a poor man the instruction would have been manifestly bad. The wealth or poverty of the deceased is entirely immaterial. The material question under the statute always is: What pecuniary loss

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have the widow and next of kin sustained by the death of the deceased? If the instruction had stated that the jury might consider "his means and opportunities with reference to the making and saving of money or money's worth" it would have been unobjectionable. C., P. & St. L. R. R. v. Woolridge, 174 Ill., 335. It may be that the jury concluded from the instruction that, as the deceased had accumulated the "means" he had at the time of his death, he would continue to accumulate at the same rate and that they should find their verdict accordingly. Such a conclusion would not be warranted by the evidence in this case. It is not clear that the jury were misled by the instruction nor is it clear that they were not misled thereby. It is also urged that the damages assessed, \$6,000, are excessive. After careful consideration of all the evidence we are inclined to think the damages are large, and when we consider the amount of the verdict in connection with the instruction above stated we are constrained to the conclusion that judgment for that amount should not stand. If the plaintiff shall within ten days after the filing of this opinion, file in this court his *remittitur* of \$2,000, judgment for the balance will be affirmed, otherwise the judgment will be reversed and the cause remanded to the Circuit Court.

Affirmed upon *remittitur* of \$2,000, within ten days, otherwise reversed and remanded.

Remittitur filed and judgment affirmed July 11, 1905.

CASES
DETERMINED IN THE
FIRST DISTRICT.
OF THE
APPELLATE COURT OF ILLINOIS,
DURING THE YEAR 1905.

Elizabeth E. Smith v. Karl Eitel.

Gen. No. 11,880.

1. **PURCHASE PRICE**—*when may be recovered.* Where a bargain and sale is completed by contract, but no delivery is made, the vendor may treat the property involved as that of the vendee and may tender the same to him and recover the purchase price either under a special count or under the common counts.

2. **MOTION TO DIRECT**—*what question raised by.* A motion to direct a verdict for the defendant raises only a question of law, namely, whether there is evidence before the jury from which, taken as true, the jury may properly find a verdict for the plaintiff.

Action in assumpsit. Error to the Circuit Court of Cook County; the Hon. JULIAN W. MACK, Judge, presiding. Heard in the Branch Appellate Court at the October term 1904. Reversed and remanded. Opinion filed July 11, 1905.

Statement by the Court. Plaintiff in error brought an action in assumpsit against defendant in error in the Circuit Court. The declaration contains the common counts in *indebitatis assumpsit* and the following special counts:

"Elizabeth E. Smith, plaintiff, by C. M. McLaren, her attorney, complains of Karl Eitel, the defendant, in a plea of trespass on the case upon promises.

For that whereas, heretofore, to-wit, on or about the 1st day of June, A. D. 1893, at said county, Garden City Filter Company was a duly organized corporation under the laws

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of the State of Illinois, and of the capital stock of which corporation this plaintiff was then and there the owner and had in her possession unincumbered, two hundred and seventy-one shares:

"And whereas, heretofore, to-wit, on or about the day last aforesaid at said county, the defendant bargained for and bought of the plaintiff, at the request of the defendant, a certain quantity, to-wit, two hundred and seventy-one shares of the capital stock of the said Garden City Filter Company, at a certain price or value, to-wit, for the sum of eleven thousand dollars at said county, said shares of stock to be delivered by the plaintiff to the defendant at Chicago, in the said county, and to be paid for by the defendant at the request of the plaintiff as follows, to-wit: Five thousand dollars on the delivery thereof and six thousand dollars six months thereafter; and in consideration thereof and that the plaintiff at the request of the defendant would deliver the said two hundred and seventy-one shares of the capital stock in said Garden City Filter Company, at the county aforesaid, the defendant then and there promised the plaintiff to accept the said shares of stock from her and to pay for the same the sum of eleven thousand dollars as promised, to-wit: Five thousand dollars on the delivery thereof and six thousand dollars six months thereafter. And although the plaintiff afterwards, at said county, was ready and willing and then and there tendered and offered to deliver the said two hundred and seventy-one shares of the capital stock of the said Garden City Filter Company to the defendant, and then and there requested the defendant to accept the same and to pay her, the plaintiff, therefor as aforesaid. Yet the defendant, not regarding his said promise and undertaking, did not, nor would, when he was requested, or at any time before or afterwards, accept the said two hundred and seventy-one shares of the capital stock of the said Garden City Filter Company, or any part thereof, or pay for the same or any part thereof at the price aforesaid or otherwise, but wholly neglected and refused so to do, to the damage of the plaintiff of eleven thousand dollars."

At the close of the evidence the defendant moved that the jury be directed to return a verdict for the defendant. Upon the suggestion of the court, the parties then entered into the following stipulation:

"The trial of this cause now pending and the defendant moving for a direction from the court to the jury to find a verdict for the defendant, it is hereby stipulated by the parties that the verdict of the jury may be taken herein, subject to the question of law thus raised, and that should it be against the defendant or should the jury disagree, the court may hereafter, should it be of opinion that the motion of defendant thus made ought to have been sustained, set aside the said verdict and enter judgment herein for the defendant as if said motion had been sustained and the jury instructed to find for the defendant."

After this stipulation had been entered into the court denied defendant's motion and submitted the cause to the jury and a verdict was returned for the plaintiff for \$11,000 damages. This verdict was set aside by the court. The defendant then moved for final judgment in his favor under said stipulation, and the court entered the following judgment:

"On the stipulation of the parties to this suit filed herein the court finds that the jury should have been instructed to find for the defendant, and the court finds as if there had been a verdict rendered herein by the jury aforesaid finding the issues for the defendant under the instructions by the court and leave is hereby given the plaintiff to file a written motion for a new trial herein *nunc pro tunc* within twenty days from this date.

Thereupon the plaintiff enters herein her motion for a new trial in said cause. After arguments of counsel and due deliberation by the court said motion is overruled and a new trial denied.

Therefore it is considered by the court that the defendant do have and recover of and from the plaintiff his costs and

charges in this behalf expended and have execution therefor."

From this judgment the plaintiff prosecutes this writ of error.

UTT BROS., for plaintiff in error.

C. H. POPPENHUSEN and JOSEPH L. McNAB, for defendant in error; S. S. GREGORY, of counsel.

MR. PRESIDING JUSTICE BAKER delivered the opinion of the court.

Under the stipulation the judgment is to be regarded as a judgment for the defendant, upon a verdict for the defendant, returned by the jury by direction of the court.

The question presented by the record is, whether there was testimony upon which, taken as true, the jury might properly have found a verdict for the plaintiff.

The evidence for the plaintiff tended to show that in May, 1903, plaintiff had two certificates of shares of stock in the Garden City Filter Company, a corporation, one for 211, the other for 60 shares; that she offered to sell 271 shares of the stock of said corporation to the defendant at the price of \$11,000 cash; that defendant replied that he would take the stock but did not know whether he could pay all cash; that plaintiff then offered to take \$5,000 cash and \$6,000 in six months and defendant said: "Well, I will take it at that"; that plaintiff handed him said two stock certificates and he took them, held them a short time and then said, that he did not have his check book with him and that plaintiff had better take the certificates and come back in three or four days and he would then pay her for them; that plaintiff went back to the defendant in the course of three or four days and he then told her that he was not yet prepared to take the stock but would be ready to do so in a week or ten days; that plaintiff repeatedly within a short time afterwards tendered said certificates to the defendant and was told by him that he was not yet prepared to take and pay for

the shares. Said certificates with a proper endorsement to make transfers on the books of the company were produced in court and tendered to the defendant.

That this testimony tended to prove that a contract was entered into between the plaintiff and defendant in relation to the purchase and sale of said shares is not disputed. The contention of defendant in error is that plaintiff's testimony tended to establish, not a completed sale of said shares by plaintiff to defendant, but only a contract on her part to sell and on his part to buy the same; that under the contract her testimony tended to prove the title to the shares did not pass and the plaintiff could not therefore recover the purchase price either under the common counts or under the special count.

We think the testimony of the plaintiff tends to show a bargain and sale, a completed sale of the shares; that taking her testimony as true, she had the right to treat the shares as the property of the defendant and did so treat them by repeatedly tendering to him certificates for the number of shares so sold to him and by tendering them to him upon the trial. This under the rule of our Supreme Court stated in *Osgood v. Skinner*, 211 Ill., 229, gave to the plaintiff the right to recover the purchase price either under the special count or under the common count for goods bargained and sold.

It follows from what has been said that in our opinion the trial court erred in rendering, under the stipulation, a judgment for the defendant as upon a directed verdict in his favor. It is insisted on behalf of the defendant in error that, irrespective of any question of law involved, the judgment should be affirmed on the facts, on the ground that under the evidence the plaintiff was not entitled to a verdict, but the verdict should have been for the defendant, and that as a basis for such judgment of affirmance upon the facts, this court ought to find, as a fact, from the evidence in the record, "that defendant did not enter into any contract for the purchase of plaintiff's 271 shares of stock in the Garden City Filter Company." Counsel on both sides

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have in their briefs reviewed the evidence and discussed the credibility of the witnesses.

Into questions of fact we cannot upon this record enter. A motion to direct a verdict for the defendant raises only a question of law, viz.: whether there is evidence before the jury from which, taken as true, the jury may properly find a verdict for the plaintiff. Upon review of a judgment upon a directed verdict for the defendant the question presented is, whether the trial court erred in directing a verdict for the defendant, and this raises only the same question of law that was decided adversely to the defendant by the trial court in directing a verdict. This court is not under the statute authorized to treat the question of law thus raised and passed upon by the trial court as one of fact. *Treat v. Merchants Life Assn.*, 198 Ill., 431. It is only where the judgment of the trial court involves and is based upon a finding of facts, by the court, or by a jury, and this court finds the facts in whole or in part different from the finding of the trial court, that this court is authorized to make a finding of facts and make a final determination of the cause based on such finding of facts. The judgment in this case is not based upon any finding of fact by the trial court, but upon the decision of that court, as a question of law, that there was no evidence upon which the jury could properly find a verdict for the plaintiff.

The judgment of the Circuit Court will be reversed and the cause remanded.

Reversed and remanded.

Adolph Kusel v. City of Chicago.

Gen. No. 11,891.

1. *CERTIORARI*—when motion to quash, not premature. A motion to quash a writ of *certiorari* made before the return is not only not premature, but if not then made is waived.

2. *CERTIORARI*—does not lie to review judgment of removal by civil service commission. The power of removal conferred by stat-

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ute upon the civil service commission is executive and their proceedings in making removal are not subject to review by *certiorari*.

Certiorari proceeding. Error to the Superior Court of Cook County; the Hon. JESSE HOLDOM, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1904. Affirmed. Opinion filed July 11, 1905.

Statement by the Court. This is a writ of error to review a judgment of the Superior Court quashing a common law writ of *certiorari*, commanding the Civil Service Commissioners of Chicago to certify to said court their proceedings relating to the discharge of plaintiff in error from the police force of Chicago. The petition was filed December 18, 1903, and avers that the petition was discharged by said Commissioners November 6, 1899; that he was a Civil Service patrolman; that the Superintendent of Police filed written charges against petitioner charging him with violation of Rule 67 of the Department of Police, "Immoral conduct or conduct unbecoming a police officer," violation of Rule 70, "Incapacity or inefficiency in the service," and Rule 74, "Disobedience of Orders," and that he was tried on said charges, found guilty and discharged by said Commissioners. The petition further avers that said rules were not rules made by the Civil Service Commissioners, but were rules made by the Superintendent of Police, before the Civil Service Act was passed; that petitioner soon after his discharge retained counsel as to his legal rights concerning such discharge and was advised that he had no remedy and that up to the date of the filing of his petition he was informed and believed that said rules were rules of the Civil Service Commissioners; that petitioner was not guilty of the violation of any rule either of the Police Department or of the Civil Service Commission and that said Commission exceeded its lawful powers and jurisdiction.

The motion to quash was made by the defendant without making a return to the writ.

A. D. GASH and JAMES H. HOOPER, for plaintiff in error.

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JOHN W. BECKWITH, for defendant in error; EDGAR BRONSON TOLMAN, Corporation Counsel, of counsel.

MR. PRESIDING JUSTICE BAKER delivered the opinion of the court.

The contention of plaintiff in error that a motion to quash or dismiss a writ of *certiorari* cannot be made before return is without merit. In *Davis v. Randall*, 26 Ill., 243, the motion to dismiss a writ of *certiorari* was made and allowed without a return, and the judgment was affirmed. A motion to dismiss or quash the writ because of the insufficiency of the petition is, in effect, a general demurrer to the petition and is waived if not made before return. *Commissioners v. Hoblit*, 19 Ill. App., 259; *Schuchman v. Commissioners*, 52 ib., 497; *School Directors v. School Trustees*, 91 ib., 96.

The record in this case presents the question whether a writ of *certiorari* lies to review the act of the Civil Service Commissioners removing a Civil Service officer or employee. Section 12 of the Civil Service Act confers upon the Civil Service Commissioners the exclusive power to remove or discharge a Civil Service officer or employee. Such removal or discharge can only be made for cause, upon written charges, and after the accused has had an opportunity to be heard in his defense. The commissioners are given by the act power to administer oaths, to compel the attendance of witnesses and the production of books and papers. If the power thus conferred upon the commissioners is judicial or *quasi* judicial; if in removing or discharging an officer or employee they exercise a judicial or *quasi* judicial function, their proceedings in making such removal may be reviewed by the courts on *certiorari*. On the other hand, if the power thus conferred is executive and not judicial or *quasi* judicial; if their act of removal is an executive and not a judicial or *quasi* judicial act, *certiorari* will not lie to review their proceedings in ordering such removal or discharge.

In *Donahue v. The County of Will*, 100 Ill., 94, it was said: "It may be in many cases difficult to determine the precise line which divides the executive and judicial func-

tions. It has been said that when the functionary hears, considers and determines he performs judicial acts. This definition is not strictly accurate. * * * There is in every executive or ministerial act a necessity for the hearing of evidence, a consideration of the evidence and a determination based on it. * * * So it is seen the definition is by no means accurate. It embraces cases that are not judicial, and hence is too comprehensive."

Under the decisions of our Supreme Court, the question whether the power of removal conferred by the Act upon the Civil Service Commissioners is executive, or judicial, or *quasi* judicial; whether in ordering the discharge of the plaintiff in error from the police force, they acted judicially or as executive officers, depends, not upon procedure, but upon the question whether any property right of the plaintiff in error was involved in such removal.

In *Commissioners v. Griffin*, 134 Ill., 330-340, it was said: "The general rule seems to be that this writ lies only to inferior tribunals and officers exercising judicial functions, and the act to be reviewed must be judicial in its nature and not ministerial or legislative. *Locke v. Lexington*, 122 Mass., 290; *State v. Mayor*, 34 Minn., 250; *In re Wilson*, 32 id., 145; *Robinson v. Supervisors*, 16 Cal., 208; *Ex parte Fay*, 15 Pick., 243; *Stone v. Mayor*, etc., 25 Wend., 157; *Esmeralda v. District Court*, 18 Nev., 438; *Thompson v. Multnomah County*, 2 Ore., 34. But it is not essential that the proceedings should be strictly and technically 'judicial' in the sense in which that word is used when applied to courts of justice. It is sufficient if they are what is sometimes termed '*quasi* judicial.' The body or officers acting need not constitute a court of justice in the ordinary sense. If they are invested by the legislature with the power to decide on the property rights of others, they act judicially in making their decisions, whatever may be their public character. *Robinson v. Supervisors*, *supra*."

In this state no public office or employment is property. *Donahue v. County of Will*, *supra*; *People ex rel. v. Kiple*, 171 Ill., 44. In the case first cited Donahue was removed

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from his office of county treasurer by the Board of Supervisors, upon the ground that he was a defaulter. He sued out a common law writ of *certiorari* to review the proceedings of the County Board which resulted in his removal. The Circuit Court quashed the writ. The Supreme Court held that Donahue had no title or property in his office of county treasurer and therefore the act of removal did not deprive him of any property; that the settling of his accounts by the County Board, the finding that he was in arrear, and the order that he be removed from his office was an executive and not a judicial or a *quasi* judicial act and therefore was not subject to review by the courts on *certiorari*, and affirmed the judgment quashing the writ. In the Kipley case the validity of section 12 of the Civil Service Act was challenged upon the ground that it conferred upon the Commissioners the power to deprive a man of his property by removing him from office without a trial by a jury, and it was said, p. 70, 71: "This position is wholly untenable. A public office is not property, nor are the prospective fees of an office the property of its incumbent. * * * In *Donahue v. County of Will* it was held that a law which authorized county boards to remove county treasurers from office on certain violations of law, was not unconstitutional; that the removal of an officer from office was not a judicial act. * * * If the removal of a county official for cause does not involve the exercise of judicial power, then certainly the removal of a municipal officer is not the exercise of judicial power."

Our conclusion from the decisions of our Supreme Court is, that the power of removal conferred by the statute upon the Civil Service Commissioners is executive and their proceedings in making such removals are not subject to review on *certiorari*. As from this conclusion a judgment of affirmance follows, we do not deem it necessary to pass upon the other grounds for affirmance urged by counsel for the defendant in error.

The judgment of the Superior Court will be affirmed.

Affirmed.

**Joseph Powell, et al., v. The People of the State of
Illinois, ex rel. Charles L. Clarke.**

Gen. No. 11,915.

1. **CIVIL SERVICE ACT—section 6 construed.** The words of this section, "with specified limitations as to residence," etc., which qualify the provision that all examinations shall be free to all citizens of the United States, refer to and mean such limitations as the civil service commission may prescribe by their rules and do not refer to or mean the limitations as to residence of officers prescribed by the City and Village Act.

2. **RESIDENCE—when not essential to employment by municipality.** The provision of the City and Village Act which provides that no person shall be eligible to office who is not a qualified elector, etc., has no application to a mere employment by a municipality as distinguished from the holding of an "office" therein, that is to say, a position created by the city council.

Mandamus proceeding. Appeal from the Superior Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1904. Reversed and remanded with directions. Opinion filed July 11, 1905.

Statement by the Court. The People of the State of Illinois, on the relation of Charles L. Clarke, filed in the Superior Court, against Powell, Meier and Errant, Civil Service Commissioners of Chicago, and Reynolds, Commissioner of Health of said city, a petition for a *mandamus* commanding said Civil Service Commissioners to strike from the list of eligibles for the position of Chief Sanitary Inspector, the names of Ball, Johnson and Ainge, and commanding said Commissioner of Health not to appoint either Ball, Johnson or Ainge, Chief Sanitary Inspector. The defendants answered the petition and the petitioner demurred to the answer. The demurrer was sustained and the defendants electing to stand by their answer, the court entered final judgment whereby it was ordered that a writ of *mandamus* issue commanding said Civil Service Commissioners to strike from the list of eligibles for the position of Chief Sanitary Inspector the names of Ball, Johnson and Ainge, and the defendants appealed.

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MACLAY HOYNE, Assistant Corporation Counsel, for appellants; EDGAR BRONSON TOLMAN, Corporation Counsel, of counsel.

No appearance for appellee.

MR PRESIDING JUSTICE BAKER delivered the opinion of the court.

We have not been favored with any brief for appellee. The contention of appellants is, that the demurrer should have been carried back and sustained to the petition. The petition avers that the Commissioner of Health requested, in writing, the Civil Service Commissioners to certify to him, in accordance with the Civil Service rules, the names of persons eligible to appointment to the position of Chief Sanitary Inspector; that notice was given and an examination held under the direction of said Commissioners, as the result of which Ball was placed at the head of the list of eligibles for said position, and Johnson, Ainge and the relator were given third, fourth and tenth places, respectively, on said list; that Ball and Johnson were residents of New York, Ainge of Michigan and the relator was an ex-soldier and an elector of Chicago. The petition then avers a demand by the relator, that the Civil Service Commissioners strike from said list the names of Ball, Johnson and Ainge, upon the ground that they were not residents or electors of Chicago, and a refusal by said Commissioners to comply with such request. It further avers a demand on the Health Commissioner not to appoint any of said persons to said position for the same reason and a refusal to comply with such request. By means whereof it is averred, the relator is kept out of the place and standing on said list to which he was lawfully entitled.

It appears from the petition that the relator's claim to a right to the writ, is based upon the contention that only an elector of Chicago who has resided therein at least one year before his appointment is eligible to the position of Chief Sanitary Inspector.

The Cities and Villages Act as amended June 26, 1895, provides that:

"No person shall be eligible to any office who is not a qualified elector of the city or village and who shall not have resided therein at least one year preceding his election or appointment. Nor shall any person be eligible to any office who is a defaulter to a corporation: *Provided, however*, this shall not apply to the appointment or election of city engineers in incorporated cities and villages: *And provided* that the same shall not apply to the appointment of attorneys in incorporated villages, if such appointee be not a defaulter to the corporation." Laws of 1895, p. 95.

Section 4 of the Civil Service Act provides that the Civil Service Commissioners "shall make rules to carry out the purposes of this Act, and for examinations, appointments and removals in accordance with its provisions." The material parts of section 6 of that Act are as follows:

"Section 6. Examinations. All applicants for offices or places in said classified service, except those mentioned in Section 11, shall be subjected to examination, which shall be public, competitive and free to all citizens of the United States with specified limitations as to residence, age, health, habits and moral character. * * * The Commission shall control all examinations."

The contention of appellee is, it is said, that the words "with specified limitations as to residence, etc.," in said section 6 refer to such limitations as then were, or in the future may be fixed by statute. With this contention we cannot agree. We think the words with "specified limitations, etc.," refer to and mean such limitations as the Civil Service Commissioners may prescribe by their rules, and do not refer to or mean the limitations as to residence of officers prescribed by the Cities and Villages Act. Section 6, article 6 of the original Cities and Villages Act approved April 10, 1872, provided that: "No person shall be eligible to

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any office who is not a qualified elector of the city or village and who shall not have resided therein at least one year preceding his election or appointment, nor shall any person be eligible to any office who is a defaulter to the corporation." Laws of 1871 (1872), 237, 238. In Hurd's Statutes this section appears as Section 77 of the Cities and Villages Act. Doubtless the Act approved June 20, 1895, was intended to amend said section 6, article 6 of the Cities and Villages Act, although it purports to amend section 77 of that Act, and it was not the intention of the legislature by that Act to amend the Civil Service Act which was passed at the same session of the legislature. The Civil Service Act gives to "all citizens of the United States" the right to take the examinations for the classified Civil Service. We cannot doubt but that if the legislature in June, 1895, when the Act in question was passed, had intended to amend the Civil Service Act which was passed in March, 1895, by limiting the right to take examinations under that Act, to electors of the city, such amendment would have been made in express terms.

If, however, it should be held that the words "with specified limitations as to residence, etc.," in the Civil Service Act refer to such limitations, as then were or thereafter might be fixed by statute, the petition must still be held insufficient. Section 2 of article 6 of the Cities and Villages Act provides that the City Council may, by a two-thirds vote, provide for the election or appointment of certain officers, and such other officers as may by said council be deemed necessary or expedient. The statute does not create the office of Chief Sanitary Inspector. The petition contains no averment that the City Council of Chicago has created such office. The position must, therefore, be held to be a mere employment and not an "office" within the meaning of that word as used in the Cities and Villages Act. *People v. Kipley*, 171 Ill., 44-80; *People v. Loeffler*, 175 Ill., 585-600; *Throop v. Langdon*, 40 Mich., 673. The provisions of that Act, by their terms, relate to eligibility to "offices" and do not apply to mere employment.

The petition does not, in our opinion, state facts which en-

title the relator to the writ of *mandamus*, and the judgment of the Superior Court will be reversed and the cause remanded to that court with directions to carry the demurrer back and sustain it to the petition.

Reversed and remanded with directions.

Charles Hathaway & Company v. The Merchants Loan & Trust Company.

Gen. No. 11,921.

1. CLAIMS AGAINST ESTATE—*act of 1903 construed.* The act of May 2, 1903, providing for the exhibition of claims against deceased's estates within one year from the grant of letters, has no application to estates in which letters had been granted at the time it went into effect.

Contested claim in court of probate. Appeal from the Circuit Court of Cook County; the Hon. JULIAN W. MACK, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1904. Affirmed. Opinion filed July 11, 1905.

Statement by the Court. The will of Charles A. Morrill was admitted to probate and letters testamentary issued to appellee January 13, 1903. A claim of appellant against his estate was allowed by the Probate Court June 25, 1903, for \$38,879 as a claim of class seven. May 2, 1904, appellee exhibited a claim against said estate which was allowed by the Probate Court for \$41,065.77 as a claim of class seven. From the order allowing said claim the appellant in this case appealed to the Circuit Court where, on a trial by the court, said claim was again allowed, and from that judgment this appeal is prosecuted.

MERRICK & RAMSAY and MILLARD, ABBEY & MILLARD, for appellants.

McCULLOCH & McCULLOCH, for appellee.

Hathaway v. Merchants L. & T. Co.

MR. PRESIDING JUSTICE BAKER delivered the opinion of the court.

The Act approved May 2, 1903, which took effect July 1, 1903, amends section 70 of the Administration Statute by changing the time limited for exhibiting claims against estates from two years to one year. The claim of appellee was not exhibited until more than one year after letters had been issued and the contention of appellant is, that such claim was barred, as to inventoried assets, by the Act of May 2, 1903.

In the view taken by us it is not necessary to decide whether that Act, standing alone, should be given a prospective or a retroactive effect. Section 4, chapter 131, R. S., provides that "No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to * * * any right accrued or claim arising under the former law or in any way whatever to affect any * * * right accrued or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding. * * * This section shall extend to all repeals, either by express words or by implication."

The right of appellee as a creditor of Morrill to exhibit its claim against his estate and have the same allowed by the Probate Court accrued when the letters were issued, and therefore was a right accrued under the former law. The claim of appellee against Morrill's estate arose under the former law. Section 4 in express terms provides that no new law shall be construed to affect "any right accrued, or claim arising under the former law."

A distinction between a statute limiting the time within which claims against estates may be exhibited and one which provides that a court of equity may entertain a bill to contest a will and prescribes the time within which such bill may be filed is pointed out in *Sharp v. Sharp*, 213 Ill., 332. The former is a Statute of Limitations. The latter alone confers jurisdiction to entertain the bill and such "jurisdic-

tion can be exercised only in the manner and under the limitations prescribed by the statute."

Construing the Act of May 2, 1903, in connection with said Section 4, our conclusion is, that the Act of May 2, 1903, was prospective in its operation; that the intention of the legislature was only to provide and declare that claims against estates in which letters should be issued after that Act took effect should be exhibited within one year from the issuing of letters and that claims against estates in which letters were issued before that Act took effect might be exhibited within the time limited by the former Act.

The judgment of the Circuit Court will be affirmed.

Affirmed.

American Exchange National Bank of Chicago v. George A. Seaverns, et al.

Gen. No. 11,598.

1. **GUARANTEE**—*when competent under pleadings.* A guarantee, the basis of this action, is discussed with respect to several counts of the declaration and *held*, competent under some and incompetent as to others.

2. **GUARANTEE**—*when notice of acceptance of, essential.* Where an instrument is a mere offer or proposal to guarantee, then notice of its acceptance is necessary; but such notice is not necessary where the instrument is on its face an absolute guarantee.

3. **GUARANTEE**—*construed a continuing obligation of indemnity.* The particular instrument set forth in the opinion, *held*, not a mere offer to guarantee but an absolute and continuing contract of indemnity.

4. **DECLARATION**—*when non-maturity of debt sued on cannot be raised by demurrer to.* The non-maturity of a debt in suit cannot be reached by demurrer to the declaration unless such declaration clearly shows such fact; otherwise it will be presumed that the maturity of the debt was prior to the institution of the suit.

Action in assumpsit. Appeal from the Circuit Court of Cook County; the Hon. JULIAN W. MACK, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1904. Reversed and remanded. Opinion filed July 14, 1905.

American Ex. Nat. Bank v. Seaverns.

Statement by the Court. This is an appeal by the plaintiff from a judgment for the defendants in an action of *assumpsit* brought on the following instrument:

“Geo. A. Seaverns,
153 Monroe Street.

Chicago, Nov. 15, 1886.

In order to help Mr. C. J. Kershaw and for his benefit we hereby agree to guarantee the firm of C. J. Kershaw & Co., a firm formed on November 1st, 1886, and composed of Chas. J. Kershaw and Hamilton Dewar, as general partners, and Charles B. Eggleston as special, under the name and style of C. J. Kershaw & Co., as above stated, to the extent of ten thousand dollars on any indebtedness the said firm may incur and owe to the American Exchange National Bank of Chicago, and that the said firm may be unable to pay.

This guarantee to continue in force from date hereof until cancelled by either of the guarantors by written notice and is to cover indebtedness that may arise during its continuance.

GEO. A. SEAVERNs,
JOHN CUDAHY,

To the American Exchange Nat'l. Bank of Chicago.”

The original declaration contained two general counts. The first averred that on etc., the defendants became indebted to plaintiff in etc., for and on account of the guaranty by defendants of certain indebtedness of the firm of C. J. Kershaw & Co., to the plaintiff. The second averred that the defendants were indebted to plaintiff in etc., for interest on money due and owing by defendants to plaintiff. And being so indebted said defendants undertook etc., to pay plaintiff said several sums of money when requested etc., and then followed the common breach. The defendants filed pleas of *non assumpsit*.

The trial court excluded the instrument upon the ground that it was not admissible under either of the above counts.

The plaintiff excepted to this ruling and then filed two additional counts. The first of these counts averred that the defendants made the said contract of guaranty and set the same out in *haec verba* and averred that they delivered the same to the plaintiff and that plaintiff confiding therein after the delivery of said guaranty advanced to the said firm of C. J. Kershaw & Co. a large sum of money, whereby said firm became indebted to the plaintiff in a large sum, to wit, the sum of over \$100,000, which said sum of money said firm still owes to plaintiff and which said sum said firm ever since the incurring of the same has been and still is unable to pay plaintiff, and that said guaranty had not been cancelled by defendants or either of them. By means whereof said defendants became liable to pay \$10,000 of said indebtedness of said firm of C. J. Kershaw & Co. to plaintiff, and in consideration thereof undertook and promised to pay the same when requested, etc.

The second additional count was a general count. The defendants filed pleas of *non assumpsit* to the second and general and special demurrers to the first additional count. Their demurrers were sustained and the plaintiff electing to stand by that count the jury, by direction, found the issues for the defendants. The motion of plaintiff for a new trial was denied and judgment entered for the defendants.

SWIFT, CAMPBELL & JONES, for appellant.

T. A. MORAN, T. A. MORAN, JR., and JAMES E. MUNROE, for appellees.

MR. PRESIDING JUSTICE BAKER delivered the opinion of the court.

It is admitted that the instrument sued on would not be admissible under the common *indebitatis* counts for money lent, money paid, etc., but it is contended that it was admissible under the first count of the declaration as a link in the plaintiff's chain of evidence to establish the fact, in that count averred, that the defendants were indebted to plaintiff on their guaranty to plaintiff of the indebtedness of Ker-

shaw & Co., and that it was admissible under the second count to establish the fact, alleged in that count, that there was money due and owing from defendants to plaintiff on which plaintiff was entitled to recover interest.

The promise contained in the written guaranty is a promise by the defendants to pay to the plaintiff the indebtedness which Kershaw & Co. should incur to the plaintiff if Kershaw & Co. were unable to pay the same, and not an original promise by defendants to pay to plaintiff such sums of money as the plaintiff should advance to Kershaw & Co. Such a promise must be declared on specially and the instrument was not admissible under the first original count. *Robinson v. Holmes*, 75 Ill. App., 203; S. C. 82 id., 317, and cases there cited.

If the instrument was not admissible to prove the indebtedness of defendants to plaintiff on their guaranty, it was not admissible to prove that there was money due from defendants to plaintiff under their guaranty, on which the plaintiff was entitled to recover interest. *Tucker v. Page*, 69 Ill., 180; 1 *Sedgwick on Damages*, sec. 338; 1 *Sutherland on Damages*, sec. 677.

The instrument was not, therefore, admissible under the second original count.

The objection that the first additional count is defective because it does not state that when the suit was brought any part of the indebtedness of Kershaw & Co. to plaintiff was due, cannot be sustained. "A declaration or complaint which shows upon its face that the cause of action alleged therein has not yet accrued is demurrable on the ground that it does not state facts sufficient to constitute a cause of action. But the fact of prematurity must appear affirmatively in order to be reached by demurrer, and unless it does so appear the court will presume that the cause of action occurred before suit was commenced." 16 *Ency. of Pl. & Pr.*, 881.

It is also insisted that said count is defective because it does not aver that the plaintiff, within a reasonable time, accepted the proposed guaranty and gave notice to the defendants of the purpose of the plaintiff to make advances

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under it. The question of the necessity of such an averment turns upon the construction of the instrument therein set out. If that instrument is a mere offer or proposal to guaranty, then notice of its acceptance was necessary, and as no such notice is averred the count must, in that case, be held defective. If it was an absolute guaranty, it became binding upon delivery to the plaintiff and no notice of its acceptance was necessary.

In *Frost v. Standard Metal Co.*, 215 Ill., 240, the guaranty was as follows:

"Chicago, July 10, 1901.

Standard Metal Co.,

Gentlemen:—

I hereby guaranty the purchase account of George K. Harrington & Co. to the amount of one thousand five hundred dollars (\$1,500).

R. CHESTER FROST."

There was no proof that the guarantor was notified by the Metal Company that it had accepted the guaranty or had given credit to Harrington & Co. on the faith of it and it was contended in that case, as in this, that such notice was essential to the creation of liability against the guarantor. In the opinion it was said that, "the guaranty is absolute and unqualified, and such guaranties become effective as soon as acted upon (14 Am. & Eng. Ency. of Law, 2nd Ed., 1145). An acceptance is necessary to create liability if there is only a proposal to guarantee; but that rule has no application when the undertaking is primary and absolute."

The guaranty in that case, as in this, was a continuing guaranty of an indebtedness to be created in the future of an indefinite amount. The instrument in question contains the following clause: "This guarantee to continue in force from date hereof until concluded by either of the guarantors by written notice." The plain import of this language is, that the instrument was in force from its date.

If the guaranty sued on in *Frost v. Standard Metal Co.*, *supra*, which contained no clause similar to that above set

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forth, became effective when acted upon without notice to the guarantor, then certainly this guaranty became effective without such notice.

Upon the authority of that case we hold that the instrument set out in the second additional count, is an absolute guaranty and not a proposal to guarantee, that it became effective when delivered to and acted upon by the appellant bank and that no notice to the guarantor of the acceptance of the guaranty, or of advances by the bank to Kershaw & Co. on the faith of it was required to make the guarantor liable thereon for such advances.

It follows from what has been said that in our opinion the second additional count states a cause of action, and that the Circuit Court erred in sustaining a demurrer to that count.

The judgment of the Circuit Court will be reversed and the cause remanded. *Reversed and remanded.*

**William Slack v. William Cooper, Master in Chancery,
et al.**

Gen. No. 11,828.

1. **FORECLOSURE SALE**—*effect of, where made under misapprehension.* A sale made by a master under the impression that the bidder represented the complainant, when in fact such party was a defendant seeking to take advantage of the absence of the complainant, may be disregarded by him where he does not offer to comply with the terms of sale and pay cash or arrange to pay cash.

2. **FORECLOSURE SALE**—*what equivalent to payment of cash.* When the bid at a foreclosure sale is made by the complainant and the amount bid does not exceed what is due the complainant under the decree, the requirement that the sale be for cash is satisfied to the same extent as if paid in money when the amount is credited on the decree, and the complainant need not pay his bid in cash.

Foreclosure proceeding. Error to the Circuit Court of Cook County; the Hon. EDWARD O. BROWN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1904. Affirmed. Opinion filed July 11, 1905.

Statement by the Court. One of the defendants in error, the German Old People's Home, obtained a decree foreclosing a trust deed upon the premises therein described, and it was ordered that said premises be sold at public auction for cash to the highest and best bidder, the decree to be executed by appellee Cooper, master in chancery, and the master's report of sale to be subject to confirmation by the court. At the time advertised or perhaps five minutes thereafter, at the room provided for sales in judicial proceedings by the Chicago Real Estate Board, the master offered the premises for sale. The representative of the Old People's Home, the holder of the decree, had not yet arrived. Plaintiff in error was present with his client, who was one of the parties defendant in the foreclosure proceeding. The master proceeded with the sale at once, acting, as he states, under a misapprehension and supposing plaintiff in error to be a representative of the complainant in the suit. When the master asked for bids, plaintiff in error quickly took advantage of the situation and offered \$3,000 for the premises. The amount found due the complainant by the decree was \$8,197 with costs and solicitors' fees, and there is testimony tending to show that the premises were fairly worth more than twice the amount of the bid. The master states that being still under the impression that plaintiff in error represented the complainant, he said to him in substance, that the bid would "leave you a deficiency of about \$5,800," or words to that effect, and being satisfied that the bidder understood the situation the master announced the sale of the premises for \$3,000 to plaintiff in error, who then said "that the bid was in the name of William Slack" and thereupon left the room with his client. No cash payment was made or tendered to the master. While the latter was still on the sales stand checking up his sales, the complainant's solicitor entered, having met Slack about fifty feet away from the sales room. The master at once told complainant's solicitor that his representative had bid \$3,000 at the sale, and was then informed that the said solicitor had no representative, and upon learning the name of the bidder said

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solicitor told the master who said bidder was. The master stated the misapprehension under which he had acted and sent complainant's solicitor after Slack to tell him that the sale was a mistake and that he, the master, would reopen the sale for higher and better bids and that he, plaintiff in error, should return. The evidence is not contradicted that this message was delivered to Slack almost immediately and that he refused to return. The master thereupon made the public announcement from the sales stand that inasmuch as he had by mistake supposed Slack to be an agent of the complainant and acting under that misapprehension had accepted his bid without payment of any money on account of the purchase, and had made the sale to Slack before the arrival of complainant's solicitor within a reasonable time of the hour fixed for the sale, and had given notice to Slack of his intention to resell the premises, the sale would be reopened for higher and better bids. Thereupon complainant's solicitor offered and bid the sum of \$7,000, and the bid having been several times announced and none higher or better having been made, the premises were struck off to the complainant for that sum. The master filed a report of sale, setting forth the above facts.

Plaintiff in error subsequently filed an intervening petition asking that the alleged sale to him be approved and affirmed and that the sale to the German Old People's Home, complainant herein, be disaffirmed, to which petition answers were filed. Upon hearing, the trial court ordered that the bid of plaintiff in error and also that of complainant be rejected and a new sale had.

CHARLES K. LADD, for plaintiff in error.

HENRY HORNER, JR., and CHARLES GOODMAN, for defendants in error; JULIUS ROSENTHAL, of counsel.

MR. JUSTICE FREEMAN delivered the opinion of the court.

Plaintiff in error contends that the acceptance of his bid by the master made a binding contract enforceable both against and in favor of the bidder.

It distinctly appears in this case that the master's acceptance of the bid for \$3,000 was under a misapprehension, he supposing that plaintiff in error represented the complainant and that no other bidders would attend the sale. He states that he felt he had through this misapprehension "Sold out the complainant to the satisfaction of the defendant." It appears that at the subsequent sale made with full notice to plaintiff in error, the premises were actually bid off for \$7,000. There need be no time lost, therefore, in considering the adequacy of the bid made by plaintiff in error or the value of the premises. It is enough that within less than half an hour after the alleged sale to plaintiff in error upon full notice to him of the resale, the premises brought two and a third times the amount of his bid. It is evident, therefore, that a grave injustice would be done the complainant, at least, if plaintiff in error should succeed in securing the mortgaged premises for which others were willing to pay \$7,000, by paying only \$3,000 to apply on a decree for \$8,197 exclusive of the costs and solicitor's fees which the decree included.

Upon hearing the intervening petition filed by plaintiff in error asking that the sale alleged to have been made to him for \$3,000 upon his bid be approved and affirmed, the chancellor found that by the decree the sale was ordered to be made for cash, that by reason of the master's misapprehension and mistake all the parties interested did not have an equal and sufficient opportunity to bid thereon, that if the sale had been made in such manner as to give all proper bidders an opportunity to bid, the premises would have brought \$7,000, and that it was for the benefit of that one of the defendants against whom a deficiency decree might be rendered, as well as of complainant, that both the alleged sales be disapproved, and a sale made such as the decree provided for.

It is apparent that the sale to plaintiff in error was not made for cash. No offer of deposit or payment was made until after the master had made the resale. In *Dills v. Jasper*, 33 Ill., 263-272, it is said that if the order upon

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which the master acts "contains special directions in regard to requiring a deposit, they should be followed." The decree in this case does not contain any such special provisions. It appears, however, that it directed the sale to be made at public auction for cash, and in the absence of any special directions as to the manner of payment, a sale can scarcely be said to have been made for cash, when a bidder after making a bid which is accepted, goes off without making or offering to make any payment whatever or any arrangement for payment.* When the bid is made by the complainant in the foreclosure proceeding and the amount bid does not exceed what is due the complainant under the decree, the requirement that the sale shall be for cash is satisfied to the same extent as if paid in money when the amount is credited on the decree, and the complainant need not pay his bid in cash. *Sage v. Central R. Co.*, 99 U. S., 334-339; *Reinhardt v. Seaman*, 208 Ill., 448-454; *Koerner v. Gauss*, 57 Ill. App., 668-671. Not so, however, when, as in the case at bar, the bidder is not a judgment creditor but an outsider, bidding for himself. It is said in *Dills v. Jasper*, *supra*, that "a bid with or without a deposit, although it is accepted by the master, does not become an absolute contract until it is approved by the court." The bid of plaintiff in error has not been so approved and may be regarded in this case as a mere agreement by plaintiff in error "to purchase the property upon the terms named if the same are approved by the court." In the case last cited it is further said that "the master may reject the bid and may again expose the property for sale" if the amount of the bid is not deposited with him at the time of its acceptance or immediately thereafter. In the case at bar there is nothing to indicate that the master intended to waive the requirement of cash payment except as to the complainant, and nothing to indicate that he intended to or did waive the requirement as to plaintiff in error. It was not complied with and the master had a right to reject the bid and again expose the premises for sale, as he did upon

actual notice to plaintiff in error, who even then made no effort at compliance until after the resale.

It is apparent that there were irregularities in the conduct of the sale, which in our judgment amply justified the action of the chancellor in setting aside and refusing to approve both sales, that to plaintiff in error and the subsequent sale to complainant, as was done. Not only was the bid of plaintiff in error inadequate as to price, but it was accepted by the master under a misapprehension as to the purchaser's identity without which such a bid would not apparently have been accepted. No cash accompanied the bid and no arrangement for paying it as the decree required was made. Plaintiff in error was not a stranger to the litigation and could not but be aware that he was taking advantage of the non-arrival of complainant's counsel, and that the master was either acting under some misapprehension or else was not dealing fairly with complainant nor with that one of the defendants who would be liable under a deficiency decree. "Although gross inadequacy of price alone will not be sufficient to avoid a sale under judicial process, yet it will when combined with irregularity in making the sale or even slight circumstances indicating unfairness or fraud, furnish sufficient ground for equitable interposition." *Smith v. Huntoon*, 134 Ill., 24-30; *Miller v. McAlister*, 197 Ill., 72-78; *Quigley v. Breckenridge*, 180 Ill., 627-631. We are of opinion that in disapproving and setting aside both sales, the chancellor exercised a sound discretion. Plaintiff in error was not a stranger to the order of sale, and it would be inequitable to allow the premises to be sold to him under the circumstances disclosed by this record for the amount of his bid.

In *Quigley v. Breckenridge*, *supra*, it is said that a decision approving or disapproving a master's report of sale may be assigned for error.

For the reasons indicated the decree of the Circuit Court complained of is affirmed.

Affirmed.

J. W. Butler Paper Company v. H. I. Cleveland, et al.
Gen. No. 11,894.

1. CORPORATE ORGANIZATION—*what may be waived with respect to.* The ten days' notice required by statute of the convening by the commissioners of the first stockholders' meeting, may be waived by the subscribing stockholders.

Action in assumpsit. Appeal from the Superior Court of Cook County; the Hon. MARCUS KAVANAGH, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1904. Affirmed. Opinion filed July 11, 1905.

ASA Q. REYNOLDS, for appellant; WILLIAM A. BITHER, of counsel.

No appearance for appellees.

MR. JUSTICE FREEMAN delivered the opinion of the court.

This is a suit in assumpsit in which appellant seeks to hold appellees jointly and severally liable under section 18, chapter 32 R. S., for debts and liabilities contracted by them in the name of "The C. & C. Company," a corporation organized for pecuniary profit, to carry on a printing and publishing business. It is claimed that the corporation was not organized in compliance with the requirements of the statute.

Section 3 of said chapter 32 provides: "As soon as may be after the capital stock shall be fully subscribed, the commissioners shall convene a meeting of the subscribers for the purpose of electing directors and managers, and the transaction of such other business as shall come before them. Notice thereof shall be given by depositing in the post office, properly addressed to each subscriber, at least ten days before the time fixed a written or printed notice stating the object, time and place of such meeting." Section 4 of the same chapter provides that the commissioners shall make a full report of proceedings, "including a copy of the notice provided for in the foregoing section." It appears

from the agreed statement of facts that the ten days' notice required by section 3 as above stated was not given, but that the commissioners convened the first meeting of subscribers to the capital stock pursuant to an instrument signed by said subscribers, in which they waived the notice provided for by the statute, and agreed with the commissioners named in the license issued by the Secretary of State and with each other, and consented and requested said commissioners without further notice which was by each subscriber waived, to convene the meeting of the subscribers to stock of the "C. & C. Company" for the purpose of electing directors and the transaction of such other business as might come before them, to be held at a time and place stated. The meeting was in fact held at the time and place so fixed.

It is contended by appellant that giving the ten days' notice to stockholders of their first meeting in the manner provided by the statute is an essential act, which cannot be waived by the subscribers to the capital stock. The liability imposed by section 18 is incurred when it is assumed to exercise corporate powers, "without complying with the provisions of this act." The only act of non-compliance charged is that no notice of the first meeting of subscribers to the capital stock, to elect directors and transact other business coming before them, was deposited in the post office, properly addressed to each subscriber, ten days before the time fixed for the meeting, but instead such notice was waived in writing by the subscribers themselves. The meeting was duly convened, the directors elected and all necessary business transacted. Report thereof was duly made to the Secretary of State, who thereupon issued a certificate of the complete organization of the corporation, and this was duly recorded in the recorder's office of Cook county. When the certificate is so recorded, the statute provides that "the corporation shall be deemed fully organized and may proceed to business." (Sec. 4, chap. 32.) A performance of the requirement that the certificate be so recorded has been held essential. *Loverin v. McLaughlin*, 161 Ill., 417-427. Until

this is done no authority exists for the corporation to proceed to business. But the authority to proceed to business is in no way dependent upon literal compliance with the particular method of giving notice of the first meeting of the subscribers of the capital stock provided by the statute. That method of notice is evidently intended for the protection of the subscribers themselves, and its purpose is served if all subscribers are in fact notified of such meeting and are in attendance thereat. The substantial thing is that they shall all have notice of the meeting in ample time, and having that we perceive no reason why they cannot waive in writing, as they have done in this case, the statutory method of giving the notice, and having requested the commissioners to convene the meeting at a time and place specifically stated, consent to such meeting and waive further notice. In so doing we find no evidence of a want of substantial compliance with the provisions of the Act under consideration. Where an effort has been made to comply in good faith with the purpose and intent of the statute in a matter of this character, and substantial compliance has occurred, it must, we think, be deemed such a compliance as the statute contemplates. Essential provisions seem to have been literally complied with, and the corporation having been authorized to proceed to business, its directors, officers or agents should not be held liable for debts and liabilities of the corporation contracted in its name. In *Loverin v. McLaughlin*, *supra*, (p. 429) it is said that statutes should be so construed as to give them a reasonable meaning "in the most beneficial way which their language will permit to prevent absurdity, hardship or injustice to favor public convenience and to oppose all prejudice to public interests." Sutherland on Stat. Const., sec. 324; Endlich on Int. of Stat., sec. 295. In *Bigelow v. Gregory*, 73 Ill., 197-200, it is held that compliance with such requirements as are statutory prerequisites is essential to corporate existence, such as filing the certificate under the act in question in that case, and it is said: "The defendants are seeking to escape from individual liability; let them show that they have complied with the

statute which enables them to do so, at least substantially, as respects the above named acts." In Beach on Private Corporations, sec. 16, it is said: "There may indeed be certain irregularities or omissions with respect to a merely directory provision of an enabling act, which while they would be sufficient to sustain an action by the State to declare a forfeiture, are yet insufficient to sustain an action brought by creditors to enforce the individual liability of members or stockholders as partners"; and it is held that a non-compliance with the enabling act in material respects will not secure exemption from individual liability; but there is a broad distinction between necessary steps in the process of incorporating and such as are not prerequisite to the assumption of corporate powers.

Without extending the discussion, we are of opinion that there was no want of a substantial compliance in the case at bar with the material requirements of the statute, and that appellees are not liable for corporate debts as appellant seeks to hold them.

The judgment of the Superior Court will be affirmed.

Affirmed.

L. Hawthorne v. The Cartier Lumber Company.

Gen. No. 11,899.

1. JURISDICTION—*presumption as to, of the Circuit Court.* It will be presumed in the absence of any showing to the contrary that the judgment of the Circuit Court was within the limits of its jurisdiction and based upon such papers or evidence as was necessary to support its judgment.

2. FORCIBLE DETAINER—*duty of defendant in appealing from judgment in.* It is the duty of the defendant in appealing from a judgment in forcible detainer to see to it that the complaint is filed with the transcript, and he can take advantage of the absence of such complaint being returned by the justice into court with his transcript and have the action dismissed.

Action of forcible entry and detainer. Appeal from the Circuit Court of Cook County: the HON. ELBRIDGE HANEY, Judge, presiding.

Hawthorne v. The Cartier Lumber Co.

Heard in the Branch Appellate Court at the October term, 1904.
Affirmed. Opinion filed July 11, 1905.

RICHARD J. FINN, for appellant.

AUGUSTUS S. PEABODY and EDWIN F. MARSH, for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

This is an action of forcible entry and detainer originally brought by appellee before a justice of the peace. The defendant, appellant here, took an appeal from the justice to the Circuit Court. It is urged in her behalf that the transcript of the justice filed in that court on appeal does not show any "complaint in writing," as required by section 5, chapter 57, R. S., and that the Circuit Court had no jurisdiction. The transcript as it appears in the record shows that the action was forcible entry and detainer, that there was a complaint filed, that the demand was for possession of realty, that a summons was issued and returned served upon appellant, who was the defendant in the suit before the justice, and in addition the transcript states that it was "considered by the court that the said plaintiff have and recover of the said defendant restitution of the premises described in the complaint, to wit," describing in detail the premises in controversy. The record further shows that in taking her appeal from the judgment of the justice, appellant filed an appeal bond, wherein it is recited over her signature that appellee recovered a judgment before the justice against appellant "for the restitution of certain premises described in the plaint, to wit," again describing the premises in controversy. It thus appears from the transcript that there was a written complaint filed with the justice in an action of forcible entry and detainer by the party claiming to be entitled to the possession of certain premises, which appellant herself states were described in the complaint. We think it sufficiently appears that a complaint in writing such as is required by the statute was filed before the justice and that he had jurisdiction of the subject-matter

and the parties. It was, moreover, appellant's duty to file with the transcript in the Circuit Court all the proper papers. It was said in *McArthur v. Howett*, 72 Ill., 358-359, that the defendant in that suit "could not properly move the court to dismiss the plaintiff's suit, because of the omission of the replevin bond from the papers filed with the justice's transcript. She, being the appellant, was subject to the duty of filing the papers, and the court had jurisdiction of the cause by her appeal."

We are referred to *Abbott v. Kruse*, 37 Ill. App., 549, and *Redfern v. Botham*, 70 Ill. App., 253, as holding a contrary view. But in the first case it did not appear "who took the transcript from the office of the justice, nor what, if any, papers accompanied it"; and in the second it is said that the transcript showed only a complaint filed, and not the character of the complaint. It will be presumed in the absence of any showing to the contrary that the judgment of the Circuit Court was within the limits of its jurisdiction, and based upon such papers or evidence as was necessary to support its judgment. *Swearengen v. Gulick*, 67 Ill., 208-211; *Wallace v. Cox*, 71 Ill., 548-550.

In *Subim v. Isador*, 88 Ill. App., 96-98, it is said that where it appears on the face of the record that the justice has jurisdiction of the persons and subject-matter it is proper to indulge in inferences in aid of the justice's transcript in respect of the regularity of the steps taken by the justice as thereon shown; and (p. 100) it is held that in the case of a *capias* issued by a justice it would be presumed that the justice required, the record being silent in regard thereto, such an oath to be made as the law required. In *Leiferman v. Osten*, 167 Ill., 93, a case of forcible entry and detainer, the written complaint in due form before the justice of the peace was not sent up to the Circuit Court with the original transcript, and its absence was not noticed by either party during the trial in the Circuit Court. It was held (p. 97) that by going to trial without calling attention to its absence the defendant waived objection that the Circuit Court had no jurisdiction to try the cause in the

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absence of the written complaint; that the court had jurisdiction of the subject-matter and of the parties, that the filing of a written complaint in the Circuit Court related only to the mode of procedure, and that any irregularity in that respect must be availed of promptly, else it will be waived. It appears that there was a written complaint in due form before the justice, but this seems to have been shown by an amended transcript filed at a subsequent term after the Circuit Court had lost jurisdiction over its judgment.

We need not, however, enlarge upon the questions above referred to, inasmuch as there is in the case no proper assignment of errors. The paper so called bears neither the title of any court nor of any cause. It does not show by whom it was made and bears no signature of party or attorney. This is not a sufficient assignment. The Bogue-Badenoch Company v. Boyden, 33 Ill. App., 252.

The judgment will be affirmed.

Affirmed.

Herman Adams, et al., v. M. L. Oberndorf.

Gen. No. 12,214.

1. **MULTIPLICITY OF SUITS**—*when equity will interfere to prevent.* Whether or not equity will interfere to prevent by injunction a multiplicity of suits depends upon the circumstances of each particular case and upon whether such interference is called for to discountenance useless litigation and prevent irreparable injury.

2. **INJUNCTION**—*when, lies to restrain assertion of fraudulent claims.* An injunction lies to restrain a number of parties from prosecuting numerous suits before a justice of the peace in remote localities, in pursuance of a conspiracy to harass and annoy the complainant, where such suits have a common basis, are predicated upon false, fraudulent and fictitious demands and will result in irreparable injury to the complainant.

3. **INJUNCTION**—*when notice of application for, waived.* A motion to dissolve, followed by a hearing, waives any error in granting an injunction without notice.

Appeal from interlocutory order granting injunction. Appeal

from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1905. Affirmed. Opinion filed July 11, 1905.

Statement by the Court. This is an appeal from an interlocutory order granting an injunction, by which appellants are restrained until the further order of court from filing any suit against complainant based upon wages alleged to be due from complainant to any of the said defendants during the time defendants or any of them were not actually working for complainant or during the time they were on a strike, being from November 17, 1904, to date of order, and from proceeding with the prosecution of suits heretofore filed against complainant by defendants in any justice court of Cook county, or in any other court based upon the same alleged cause or causes of action.

The bill of complaint is quite lengthy and sets forth that complainant is a wholesale tailor employing in his business a large number of cutters, trimmers, tailors and others; that the defendants were members of labor organizations known as local unions of the United Garment Workers of America; that complainant and twenty-six other firms and corporations are members of the National Wholesale Tailors' Association; that said association entered into certain so-called contracts with the said various local labor unions; that such contracts provided among other things that said association would employ only members of said unions, which contracts have since been held unlawful, it is said, and further provided that in case of labor troubles, the wages of the members of such local unions should cease until such labor troubles were settled, and that such difficulties should be submitted to arbitration, that none of the members of the local unions should engage in any sympathetic strike except for union principles and that the question whether union principles were involved should be submitted to arbitration before any strike should be called. It is further represented that on or about November 17, 1904, said defendants and other members of said local labor unions employed by complainant and the other members of the association struck

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without just cause, voluntarily terminated their employment and still remain out of such employment, without submitting or offering to submit the questions involved to arbitration; that since said voluntary strike, defendants and other members of said local unions have rendered no services to complainant nor to the other members of said association nor have complainant or the other members of the association become indebted to said defendants or any of the striking members of said unions.

Complainant represents that for the purpose of harassing and annoying complainant and the other members of said association and to involve them in vexatious and expensive litigation, the defendants and other members of said local unions confederated and conspired among themselves and with their agents and attorneys to institute and prosecute a large number of suits at law against complainant and the other members of said Wholesale Tailors' Association, upon false, fraudulent and fictitious claims based upon an alleged breach of those portions of the said alleged contracts between said association and the said local unions which provided for the employment by members of said association of those only who should be members of said unions; and that said defendants falsely and fraudulently claim to be entitled to recover wages for the period when they were striking and rendering no services of any kind to their former employers. It is further represented that all of the defendants and many other members of said local unions have served upon complainant and other members of said association demands in writing calling for payment of wages for the period when they were, as before stated, on a strike, that they have engaged attorneys and caused upward of 150 printed demands to be so served, and have threatened upon failure to make such payments to bring suit upon each of such demands to recover the amount of the same and attorneys' fees; that upward of 150 such suits have been instituted, and for the purpose of further harassing and annoying complainant and other members of said association so sued, and rendering it more difficult to defend against such suits

they have been brought in many different justice courts of Cook county, a large number of them before a justice whose location is very remote from the business center of Chicago, with the purpose of forcing complainant and the others so sued to permit judgments for damages to be rendered in such outlying justice courts from which appeals must be prosecuted at large expense. It is charged that many other such suits are threatened based upon the same false, fictitious and fraudulent claims, and that, brought by so many different plaintiffs against many defendant firms and corporations as defendants, the decision of any one suit would not be conclusive of the issues involved in any other and could not be pleaded as a former adjudication upon the same facts, all of which it is stated is a part of the plan thus inequitably and illegally conceived, which will be carried out unless defendants are restrained by injunction.

It is charged that the defendants and other members of said local unions are insolvent and unable to respond in damages or for costs which may be hereafter adjudged against them, and that unless so restrained by injunction, complainant and other members of said association will be greatly injured and damaged by the bringing of a multiplicity of such suits and will suffer irreparable loss and injury.

The prayer is for an injunction restraining the defendants and their agents, and all other members of such local unions and all other persons who may hereafter institute or threaten suits based upon the like false, fictitious and fraudulent demands, from proceeding with such litigation and for other relief.

Appellants formally demurred to the bill and moved to dissolve the injunction for want of equity on the face of the bill. The motion was denied.

JACOB C. LE BOSKY and WILLIAM SLACK, for appellants;
WILLIAM PRENTISS, DAVID L. CRUCE, JOHN C. WILSON
and FRANK P. REYNOLDS, of counsel.

FRANK W. WHEELER, FREDERICK D. SILBER and MARTIN J. ISAACS, for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

The first of the grounds upon which we are asked to reverse the interlocutory order granting the injunction complained of is that equity will not, it is said, assume jurisdiction to prevent a multiplicity of suits at law brought by different persons on different contracts against another; that it must appear from the allegations of the bill that the suits are all alike and at least one has been determined adversely, notwithstanding which the plaintiffs therein continue to vex and harass the complainant with additional suits. We do not deem it necessary to point out at length exact distinctions which have been drawn in cases where multiplicity of suits has been advanced as ground for equity jurisdiction. It may be said, however, that there are averments in this bill which bring it squarely within one of the cases at least in which the jurisdiction of equity is regarded as fully settled, viz.: "In suits by a single party against a number of persons to restrain the prosecution of simultaneous actions at law brought against him by each defendant and to procure a decision of the whole in one proceeding where all these actions depend upon the same questions of law and fact." Pomeroy's Eq. Jur., vol. 1, sec. 274. See also sec. 245; *Edward Hines Lumber Co. v. Scott*, 101 Ill. App., 523-527, and references there cited. That there is community of interest in the questions of law and fact alleged to be involved in the litigation in controversy sufficiently appears from facts stated in the bill. Whether or not equity will interfere to prevent by injunction a multiplicity of suits depends upon the circumstances of each particular case, and upon whether such interference is called for to discountenance useless litigation and prevent irreparable injury. *Mil. Elec. Ry. & Light Co. v. Bradley*, 108 Wis., 467-487, *et seq.*; *City of Chicago v. Collins*, 175 Ill., 445-453.

In the present case, facts stated in the bill and admitted by the motion and demurrer tend to show that defendants and their associates are prosecuting numerous suits before justices of the peace in remote localities in pursuance of a conspiracy to harass and annoy former employers, which suits are based upon false, fraudulent and fictitious demands. It is idle to say that such a combination or conspiracy is not unlawful merely because it is lawful to bring suit upon claims real or imaginary. The gist of the conspiracy is the combination to harass and annoy complainant and others, and to put them to great expense by suits having no legal foundation. Such conspiracy is unlawful. *Arthur v. Oakes*, 63 Fed. Rep., 310-321, *et seq.* It is evident from the facts alleged that this scheme if permitted to go on will result in damage to complainant, and as the motion to dissolve admits appellants to be insolvent and irresponsible, the damage is likely to be irreparable. For such damage it is apparent complainant can have no adequate remedy at law; and generally, although equity will hesitate to intervene where there is an adequate legal remedy, yet where the facts show that adequate relief can best be had in a court of equity, jurisdiction for that purpose may in proper cases be assumed. *City of Chicago v. Collins*, *supra* (p. 453). There are many cases where the remedy is concurrent and where equity being flexible, can administer justice more fully than can be readily done under the rules of law. *Schack v. McKey*, 100 Ill. App., 294-299. There can be no question in view of the facts set out in this bill that a conspiracy such as is here shown affords proper ground for equitable interference. From the averments of the bill, the defendants seem to have devised an ingenious scheme of persecution. They bring numerous suits before justices of the peace against former employers whose service they have voluntarily left, to recover wages while they were on a strike and which they have done nothing to earn; and they ask for damages because when they quit work the employers, as they claim, violated an alleged contract if such it may be called, to employ only union workmen, by filling the vacant

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places with men who would work. If the facts are as stated in the bill such suits have evidently no shadow of justification. Even if these demands were legal, yet if prosecuted in pursuance of a conspiracy to injure, a court of equity might properly assume jurisdiction; but where there is a conspiracy to harass and damage by suits based upon false, fraudulent, and fictitious demands, there can be no question as to the jurisdiction of equity to interfere. *Milwaukee Elec. Ry. & Light Co. v. Bradley*, 108 Wis., 467-488; *U. S. v. Haggerty*, 116 Fed. Rep., 510-518.

As to the objection that the bill is bad for multifariousness it is disposed of by what is said in *North Am. Ins. Co. v. Yates*, 214 Ill., 272-284. If it be true as stated that the injunction was issued without notice, the objection has nevertheless been waived by the appearance of the defendants and the motion to dissolve. The parties have had a hearing on that motion and all the benefit the notice could have procured them. *Williams v. Chi. Ex. Co.*, 188 Ill., 19-27; *High on Injns.*, sec 1615.

The interlocutory order granting the injunction complained of will be affirmed.

Affirmed.

Ellen Rich, et al., v. John D. Mulloney, administrator.

Gen. No. 12,410.

1. **RECEIVER—when appointment of, erroneous.** The appointment of a receiver and the taking away through him of the control of an old and established business from the hands of a trustee who has had an active interest therein for years and who was acting under the direction of a court of chancery, without a showing of cause therefor, and without the consent of the majority interest in the trust, is improper and erroneous.

Appeal from interlocutory order appointing receiver. Appeal from the Superior Court of Cook County; the Hon. MARCUS KAVANAGH, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1905. Reversed. Opinion filed July 11, 1905.

Statement by the Court. This is an appeal from an interlocutory order appointing a receiver.

Appellant, who is administrator of the estate of Ellen P. Rich, deceased, and of her brother, George F. Rich, also deceased, filed a bill alleging that he is acting as such administrator by appointment of the Probate Court of Suffolk county, Massachusetts, and reciting that Elisha B. Rich of Chicago, who died testate on or about November 22, 1897, left a will which was probated in Cook county, Illinois, where the estate was settled and closed in the Probate Court November 30, 1900. Said Elisha left as his heirs his widow, Ellen F. Rich, and George F. Rich, his son, both since deceased, also a son, Edward W. Rich, and a daughter, Della C. Ricker. By the will of the father, Elisha B. Rich, of Chicago, as the bill alleges, all the property was given to the widow and the three children in equal parts, except the property used in and constituting the business of the firm of E. B. Rich & Son. The will disposed of this property as follows: "After the payment of said funeral expenses and debts I desire and direct that the business of manufacturing and selling saw sharpeners, which has heretofore been carried on under the name of E. B. Rich & Son, be continued under the management and provision of and my son, Edward W. Rich, or the survivor of them; and the salary of Edward W. Rich shall be \$30 per week so long as he shall serve in such capacity."

By a codicil bearing the same date as the will, it is provided as follows: "It is my desire that the business of E. B. Rich & Son shall continue about as it has for the past five or six years, and that Edward D. Green shall in case of my death act for me in all things pertaining to said business, and I hereby appoint said Edward D. Green as my said trustee for the said business, and shall pay quarterly to my wife during her lifetime a sum equal to 30 per cent of the net profits of the business, her interest to revert to my son Edward W. Rich at her death."

The bill shows that when the estate of Elisha B. Rich was closed in the Probate Court of Cook county, the ex-

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ecutors turned the property and effects used in the business, and all open accounts over to said Green as trustee, who conducted the business until March 25, 1903, when he filed his bill in the Circuit Court of Cook county asking to resign and praying that Ellen P. Rich (the wife of Edward W. Rich) be appointed trustee as his successor in trust, which was done. It is stated that to this bill none of the beneficiaries of the will of Elisha were made parties except Edward W. Rich.

It appears that the widow, Ellen F. Rich, died in Boston November 18, 1902, and the son, George F. Rich, died at the same place February 4, 1903, both intestate.

It is charged that said Ellen Rich as trustee has not attended in person to the business, and that the volume of the business has since her appointment been decreasing; that complainants and Edward W. Rich are joint owners of the said property and business, and that complainants are desirous of having the trust terminated and the assets sold and profits divided; that the will and codicil of Elisha B. Rich are claimed to be ambiguous and uncertain, and that such claim has occasioned embarrassment. It is charged that complainants have applied to said trustees for an accounting, but said request has not been complied with; that said Ellen Rich, trustee, permits the use of the funds of the alleged trust estate for herself and husband, and complainants "fear the charge that the creditors and heirs at law" of the widow and deceased son are in danger of losing the amount due them from the estate of Elisha B. Rich, deceased. The bill prays for an injunction restraining the trustee and her husband from collecting the accounts, for a receiver to take charge of the books of account, property, accounts and effects of the estate of Elisha B. Rich, deceased, for an interpretation and construction of the will and codicil, the termination of the trust, and that a receiver be appointed and directed to convert all of the property of every kind belonging to the estate of said Ellen F. Rich, deceased, into cash and distribute the proceeds.

The original complainants were Della C. Ricker, daughter

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of Elisha B. Rich, deceased, and John D. Mulloney, the foreign administrator. The verification of the bill is by said Ricker. Upon the hearing of the application for a receiver, however, she filed an affidavit, stating that although she signed and made oath to the bill, she did so under a misapprehension, that she did not fully understand the object sought to be accomplished by the bill, was misinformed as to the effect it would have upon the business conducted by Ellen Rich as trustee, that she has confidence in the good faith and ability of the present management of the business, does not desire the appointment of a receiver for the business, and that it is her desire that the suit so far as it concerns her be dismissed.

The bill of complaint was thereupon dismissed as to said Della C. Ricker February 14, 1905, but two days later the court appointed as receiver one Herbert Friedman, with the usual power and duties of a receiver, upon filing bond in the sum of \$6,000. From this order the defendants to the bill appeal.

GILMER GILBREATH and JOHN S. STEVENS, for appellants.

No appearance for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

There is no appearance and no brief filed in behalf of appellee. Apparently no counsel are willing to defend in this court the appointment of a receiver under this bill. It is clear that such appointment should not have been made.

In the first place the principal complainant by whom the bill was originally verified, files an affidavit stating that she signed and made oath to it under a misapprehension that she has confidence in the good faith and ability of the management of the trustee and does not desire the appointment of a receiver. At her request the bill is dismissed as to her, and yet upon a bill, the verification of which has been formally withdrawn, a receiver has nevertheless been appointed.

Again, the trustee Ellen Rich is shown on the face of the

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bill to be acting under formal appointment of the Circuit Court of Cook county. She was and is amenable to that court for any dereliction in duty. Yet upon an unverified bill which makes no charge of insolvency or lack of responsibility in the trustee, upon no better ground than the alleged belief, not justified by any facts stated, of complainant, a foreign administrator; that a large balance is coming to him as administrator from said estate, and that he fears and charges the creditors and heirs at law are in danger of losing the amount due them, the property and business are taken out of the hands of a regularly appointed trustee and from the control of parties who, under the allegations of the bill, have at least a third interest in the property, with a possibility that under the will of Elisha B. Rich, the son, Edward W., husband of the trustee, may in fact be found to have a larger interest, and turned over to the control of a receiver in whose selection the owners of two-thirds at least of the property have no voice and against whose appointment they both protest. In *Schack v. McKey*, 100 Ill. App., 294-300, we said that "a court of equity is not justified in arbitrarily taking the possession of property from one holding it under claim of valid title, merely because another disputes the holder's claim. (*First Nat. Bank, etc., v. Gage*, 79 Ill., 207; *Beach on Receivers*, sec. 5; *Harn v. Quackenbush* Am. Bankruptcy Rep., vol. 5, No. 5-483.) The power to appoint a receiver and put him in possession of another's property is one of the most important prerogatives of equity, only to be exercised by the conscientious chancellor when it is clear there is no other adequate means of doing justice between the parties and preventing the accomplishment of a wrong." In *Lemker v. Kalberlah*, 105 Ill. App., 445, 452, we said, that a receiver should be appointed in no case unless it is made to appear there is an imperative necessity for the step to preserve some particular property for such parties as shall be entitled thereto. See also *Baker v. Administrator*, 32 Ill., 79-115; *Consolidated S. M. & M. Co. v. Loeber*, 96 Ill. App., 128.

We find nothing in the bill in this case which can seem

to justify taking an old established business out of the hands of the trustee and of her husband, Edward W. Rich, who has had an active interest in it for many years. The trustee is acting under the direction of a court of chancery. She and her husband are apparently perfectly solvent, they are not charged with fraud in the management, and by the admissions of the bill the trustee's husband, Edward W. Rich, is conducting the business which his father's will provided should be continued under his supervision and management; and he apparently claims with some show of right under his father's will, admitted to be ambiguous, a controlling interest. In any event the appointment of the receiver was erroneous, and the order of appointment will be reversed.

Order reversed.

Frank Stafford v. William H. Swift.

Gen. No. 12,481.

1. *LEASE—when equity will enjoin violation of covenants of.* Injunction lies to restrain the violation of negative or restrictive covenants contained in a lease.

2. *INJUNCTION—when lies to prevent interference with rental sign.* An injunction lies to restrain a tenant from removing from the premises occupied by him a "To Rent" sign where the lease under which his occupancy exists gives to the landlord the right to exhibit the same on such premises.

3. *INJUNCTION—when issuance without notice proper.* In this case it is held that the bill being on oath, and positive in its averments, shows sufficient likelihood of prejudice resulting to the complainant's rights from the delay which would result from the giving of notice of the application for the injunction.

Appeal from interlocutory order granting injunction. Appeal from the Superior Court of Cook County; the Hon THEODORE BRENTANO, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1905. Affirmed. Opinion filed July 14, 1905.

Statement by the Court. This is an appeal from an interlocutory order granting an injunction by which appellant

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is restrained from preventing or interfering in any way with appellee's placing or causing to be placed a notice "To Rent" on premises described in the bill of complaint, or from interfering in any way with any notice "To Rent" heretofore or hereafter placed or caused to be placed upon said premises by appellee.

It appears from appellee's bill of complaint that he leased the premises in question consisting of a store room and flat on the first floor of the building described in the bill, for a term ending May 1, 1904; that the lease provided among other things that appellee should be permitted to put upon the premises at all times a notice "To Rent," appellant not to interfere therewith; that when a short time prior to March 29, 1905, appellee placed such notice on the premises appellant wrongfully interfered with and removed it; that by reason of such violation of the terms of the lease appellee brought a suit of forcible entry and detainer before a justice of the peace and obtained judgment for possession; that thereupon appellant gave notice of appeal from said judgment; that since the rendition of said judgment appellant has torn down and removed another notice "To Rent" and refuses to permit appellee to have such a notice on the premises, although his lease expires April 30, 1905, and the renting period for stores in that locality is from May 1st in each year; that unless permitted to place such notice "To Rent" upon said premises and unless appellant be restrained from removing or interfering therewith, appellee will be unable to notify the public that said premises are for rent and will be unable to get a tenant therefor, beginning May 1, 1905. The injunction was issued in accordance with the prayer of the bill without notice.

P. H. BISHOP, for appellant.

IRA H. ELLIS, for appellee; SWIFT, CAMPBELL & JONES, of counsel.

MR. JUSTICE FREEMAN delivered the opinion of the court.

Appellant asks for a reversal of the order granting the injunction upon the alleged grounds that the bill does not present a case entitling appellee to equitable relief; that even if the bill is sufficient yet on the showing made he was not entitled to a temporary injunction and that in any event the injunction should not have been issued without notice. We are unable to discover from appellant's argument wherein the bill fails to present a case calling for relief in equity. The contention is that the absence of the sign "To Rent" might not prevent appellee from procuring a tenant; that there were other means of notifying the public that the place was for rent, that the only damage appellee could possibly sustain would be that he might not obtain a tenant for a term commencing May 1, 1905, but from aught that appears, his ability to procure one for a period commencing some time after May 1st would not be impaired. It is scarcely necessary to say that we are able to find no force in such contentions.

It is argued that appellee has a complete remedy at law in an action for damages, since it does not appear that such a judgment could not be collected. But the exercise of the preventive jurisdiction of courts of equity in cases of violation of negative or restrictive covenants annexed to leases is sustained by abundant authority, and is based "in part upon the necessity of preventing a constantly recurring grievance resulting from the continuous breach of the covenant which can not be adequately compensated by an action for damages." High on Injns. 3rd ed. sec. 436. In Consolidated Coal Company v. Schmisser, 135 Ill., 371-378, it is said that courts will interpose by injunction and indirectly enforce specific performance of negative covenants in contracts or leases even though their breach may occasion no substantial injury or though damages, if any, may be recoverable at law. See also United States Trust Co. v. O'Brien, 18 N. Y. Supp., 798-800, where it is said that such a covenant as that here in question could be more effectually enforced at the time with perfect and complete justice in equity, than afterward by the uncertain char-

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acter of proof available in an action at law for compensatory damages.

It is assigned as error that the injunction issued without notice to appellant. The bill is accompanied by an affidavit stating that complainant's rights will be unduly prejudiced if the injunction is not issued immediately and without notice. The issue of an injunction without notice is forbidden by the statute "unless it shall appear from the bill or affidavit accompanying the same that the rights of the complainant will be unduly prejudiced" otherwise (R. S. chap. 39, sec. 3). The affidavit is positive in its averments, not on information and belief, and is we think sufficiently supported by the facts stated in the bill and the showing that appellant was actually proceeding to do the thing complained of. *Parish v. Vance*, 110 Ill. App. 50. The bill shows that appellee was entitled under the covenants of the lease to maintain a sign or notice on the premises showing that they were for rent, that appellant had twice removed or torn down such notice and refused to allow such notice to be again put up on the premises. There remained only about a month before the first of May in which to secure a tenant, and it was evident that if delay were had appellee might be unduly prejudiced by inability to at once notify the public passing by, that the premises were for rent. Appellant's conduct in the matter as stated in the bill warranted the apprehension that if notified of the application for injunction he would delay the proceeding so far as lay in his power. Upon the whole we are of opinion that the issue of the writ without notice was justified by the facts of the particular case.

The order complained of must be affirmed.

Affirmed.

Robert Smith Parks v. Northwestern University.**Gen. No. 11,852.**

1. **PUBLIC CHARITY**—*what comes within legal definition of.* A university dependent upon trust funds, and incidental tuition fees not required for purposes of gain, comes within the legal definition of a public charity.

2. **RESPONDEAT SUPERIOR**—*eleemosynary institution exempt from doctrine of.* Public charities are eleemosynary institutions and are exempt from the operation of this doctrine.

Action on the case for personal injuries. Appeal from the Superior Court of Cook County; the Hon. JESSE HOLDOM, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1904. Affirmed. Opinion filed July 11, 1905.

ASHCRAFT & ASHCRAFT, for appellant; W. S. DRAPER, of counsel.

H. H. C. MILLER and C. G. LITTLE, for appellee.

MR. JUSTICE SMITH delivered the opinion of the court.

The record in this case presents the question whether the appellee, Northwestern University, is liable to one of its students who paid to it a sum of money for his tuition, for an injury received by him while pursuing his studies in its chemical laboratory resulting from the negligence of the professor or instructor in charge, there being no allegation or charge in the declaration that the defendant was negligent in the selection or appointment of such professor or instructor.

The declaration charges the loss of an eye of the plaintiff, through the negligence of the professor, when the plaintiff was in his charge as a student, and in the class room or laboratory. A demurrer was sustained to the declaration upon the ground that the defendant is a charitable or eleemosynary institution, and for that reason was exempt from liability, although the declaration charges it was conducting a school and undertook to teach the plaintiff for hire.

The question as to whether the defense should be raised by demurrer or plea is waived by counsel for appellant in their brief, and it is agreed that the case may be considered as if the charter of the defendant was fully pleaded, and the issue of law made thereon.

The defendant is operating under a charter conferred by the Legislature of this State, (Private Laws of Illinois 1851, p. 20) and amendments thereto passed in 1855, 1861 and 1867. An examination of the Act of 1851 shows that the defendant holds its property of every kind solely for educational purposes. Its entire funds, whether derived from money or property given to it, or from income from such funds or properties, or from the tuition of students or other sources, must be used solely for educational purposes. The powers granted to it are for the purpose of enabling it to handle and manage its property in aid of the main purpose of its creation, which is education, and for no other object or purpose. A public charity is not necessarily confined to institutions or corporations which confine their gifts or assistance to the poor and needy. The term public charity has a broader significance. One of the earliest forms of public charity known to the law was that of a school and college. In *Dexter v. Harvard College*, 176 Mass., 192, the court said: "That a gift for the promotion of education in Harvard College is a public charity, is a proposition too plain to need discussion. In St. 43 Eliz., chap. 4, sec. 1, 'Schools of learning, free schools and scholars in universities, are mentioned as charitable objects. Such a public charity need have no special reference to the poor.' In *American Academy v. Harvard College*, 12 Gray, 582-594, Chief Justice Shaw says: 'That a gift designed to promote the public good, by the encouragement of learning, science and useful acts, without any particular reference to the poor, is regarded as a charity, is settled by a series of judicial decisions and regarded as the settled practice of a court of equity. Such is a bequest for the improvement of a city, * * * to establish new scholarships in a college, * * * to found and endow a college.'"

The cases of *Andrews v. Andrews*, 110 Ill., 223-231; *Female Academy v. Sullivan, et al.*, 116 Ill., 375; *Vidal v. Girard Executors*, 2 How., 127; *Downs v. Hospital*, 101 Mich., 555; *Fire Ins. Patrol v. Boyd*, 120 Pa. State, 624; *Currier v. Trustees Dartmouth College*, 117 Fed. R., 44, hold to the same effect. Our conclusion, therefore, is that the defendant is a public charity, depending entirely upon trust funds for its support, and must be so treated and held by courts.

Counsel for appellant do not controvert the general proposition that defendant is a public charity, but they insist that it is not such a public or *quasi* public corporation as to entitle it to exemption from suits for damages arising from the negligence or mismanagement of its officers and agents within the scope of their duties as such; nor is it exempt from civil action on account of its negligence in not providing a safe place in its chemical laboratory in which the plaintiff could pursue his studies, or for the negligence of its vice-principals in conducting the business for which it is chartered. They urge that the doctrine, which had its origin in *Russell v. Men of Devon*, 2 D. & East, 667, and *Halliday v. St. Leonard*, 11 C. B. N. S., 192, and has been generally accepted in the United States, exempting towns, counties and all involuntary governmental organizations from liability for negligence in maintaining streets and bridges and in their municipal acts, has no application to corporations of the character of defendant, which have accepted a private charter. We do not understand, however, that the exemption from liability contended for by appellee is based upon, or springs from the principle upon which involuntary municipal corporations such as towns, counties, school districts, etc., are exempt from liability for negligence in their municipal acts. As stated in *Elmore v. Drainage Commissioners*, 135 Ill., 269: "In such organizations the duties and their correlative powers are assumed in *invitum*, and there is no liability to respond in damages in a civil action for neglect in the performance of duties, unless such action is given by statute.

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"The grounds upon which the liability of the municipal corporation proper is usually placed are, that the duty is voluntarily assumed, and is clear, specific and complete, and that the powers and means furnished for its proper performance are ample and adequate. In such cases there is a perfect obligation, and a consequent civil liability for neglect in all cases of special private damage."

If we are to apply these principles to public charities, as appellant contends, the logic would be clear, and all public charities must be held liable, for they are all voluntarily assumed and administered, and being voluntarily assumed, the liability would follow, and the funds and properties contributed to them by the donors would be in danger of being swept away and applied to objects not contemplated by the donors. But, in our opinion, these principles are not applicable to public charities. The principle upon which public charities are held exempt from the doctrine of *respondeat superior* is that a public charity, whether incorporated or not, is but a trustee, and is bound to apply its funds and property in furtherance of the charity, and not otherwise. The law will not permit the trustee to divert or use the funds or property of his trust for any object not contemplated in the trust, and what the law will not permit the trustee to do, it will not do itself. If the doctrine of *respondeat superior* is to be applied to a trust of the character here involved, as contended by appellant, we would have a result contrary to all reason and justice. Damage would be paid not from the pocket of the wrong doer, but from a trust fund, in violation of the terms and objects of the trust.

In reviewing the case of *Currier v. Trustees of Dartmouth College*, 117 Fed. R., 44, Judge Putnam, although holding that the court was not compelled to decide the question, expresses so aptly the unreasonableness of the doctrine contended for by appellant that we quote his language. He says: "Nevertheless, there are difficulties of a serious character as suggested by the learned judge in connection with the disposition of this case in the Circuit Court, which ren-

der it apparently contrary to the fundamental notions of justice to apply to institutions of the character of the defendant the ordinary rule with regard to negligence and reasonable care to their full extent. As well suggested by him, is the institution liable for some mistake of some professor in conducting a difficult experiment in the chemical laboratory, or of an assistant to the professor, when by the very nature of things assistants are somewhat largely inexperienced? Does the law require that all the appurtenances of a gymnasium attached to an educational institution shall be regarded with the same strict rules as those of a manufacturing establishment? Our institutions of learning are commonly known as often poorly endowed, and in the receipt of no profits, and at the most of only a moderate income, and often, therefore, disenabled from making use on their premises of modern appliances for safety. Are they liable to one who enjoys their beneficence, knowing that such is their frequent position, as ordinary business corporations are liable?"

In the *Fooffees of Hariot's Hospital v. Ross*, 12 C. & F., 506, an action was brought by Ross, a person eligible for admission to the hospital, to recover damages for the wrongful refusal of the trustees to admit him. The case was appealed to the House of Lords where it was unanimously held that the action could not be maintained. Lord Brougham said: "The charge is that the governors of the hospital have illegally and improperly done the act in question, and therefore, because the trustees have violated the statute, therefore, what? Not that they shall themselves pay the damages, but that the trust fund which they administer shall be made answerable for their misconduct. The finding on this point is wrong, and the decree of the court below must be reversed." Lord Cottenham said: "It is obvious that it would be a direct violation, in all cases, of the purpose of a trust if this could be done, for there is not any person who ever created a trust that provided for payment out of it of damages to be recovered from those who had the management of the fund. No such provision has

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been made here. There is a trust, and there are persons intended to manage it for the benefit of those who are to be the objects of the charity. To give damages out of a trust fund would not be to apply it to those objects which the author of the fund had in view, but would be to divert it to a completely different purpose."

From the time of the decision in the above case down to the present, no decision in England or in this country can be found, we think, holding that an institution of learning, like the defendant, is liable under like or similar circumstances to those charged in the declaration. On the contrary the uniform course of the decisions has been in favor of non-liability. We refer to a few of them. *Riddle v. Proprietors of the Locks*, 7 Mass., 187; *McDonald v. Mass. Gen. Hospital*, 120 Mass., 432; *Sherbourne v. Yuba Co.*, 21 Cal., 113; *Brown v. Inhabitants of Venalhaven*, 65 Me., 402; *Mitchell v. City of Rockland*, 52 Me., 118; *City of Richmond v. Long*, 17 Grattan, 375; *Ogg v. City of Lansing*, 35 Ia., 495; *Murtaugh v. City of St. Louis*, 44 Mo., 479; *Patterson v. Penn. Reform School*, 92 Pa., 229.

It is further urged that the plaintiff was a student for hire, and that the defendant is authorized to charge and receive tuition by its charter. Therefore, when the plaintiff was admitted as a student and paid his tuition, a contract existed between the plaintiff and defendant in which the defendant assumed precisely the obligations and incurred precisely the same liability an individual would have incurred under a like contract. We are of the opinion that the fact that the plaintiff was required to and did pay tuition for the instruction and benefits offered by the defendant, does not deprive the defendant of its eleemosynary character. The amounts thus received from plaintiff and other students are not for private gain, but contribute to the funds of the institution and enable it more effectually to accomplish the purposes for which it was founded and organized. The fact that the defendant received from the plaintiff and other students tuition, does not make it the less a public charity, nor does it expose the trust fund to

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the liability of being depleted or frittered away by the negligence of its officers, professors or employees. In case of injury the wrong-doer, not the trust fund, must respond. *Gooch v. Association*, 109 Mass., 558; *Powers v. Mass. H. Hospital*, 109 Fed. R., 294; *Downs v. Hospital*, 101 Mich., 555.

The judgment of the court below is correct and is affirmed.

Affirmed.

Empire Fire Proofing Company v. William C. Comstock, et al.

Gen. No. 11,896.

1. **CONTRACT**—*when trustees executing, are not personally bound by.* Where it appears from the contract in question, by the manner in which it is signed, as well as by the surrounding circumstances, that the parties signing the same as trustees were not acting for themselves but for a trust estate represented by them, the latter only is bound and not the individual trustees in their personal capacities.

2. **CONTRACT**—*relating to trust estates enforceable in equity.* Contracts made with trust estates, in the name thereof, are enforceable in equity, notwithstanding such estates are not legal entities.

Action of covenant. Appeal from the Superior Court of Cook County; the Hon. WILLARD M. McEWEN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1904. Affirmed. Opinion filed July 11, 1905.

Statement by the Court. This is an action of covenant brought by appellant against appellees for work done under a building contract. The first and third counts of the declaration declare on an award alleged to have been made by one Charles T. Eiker, in pursuance of certain provisions of the contract. The second and fourth counts declare upon the contract, omitting the award. The court below held all of the counts insufficient and entered judgment for the defendants.

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The material portions of the contract declared on are as follows:

"This agreement, made the twenty-fourth day of July, 1899, between Empire Fire Proofing Company, party of the first part (hereinafter designated the Contractor), and Estate of Charles Comstock, party of the second part (hereinafter designated the Owner).

"ARTICLE I. That the contractor agrees to provide all materials and perform all work mentioned in specifications or shown on the drawings prepared by architect, Charles R. Ayars, for the fire proofing work in building at the corner of Sherman avenue and Davis street, Evanston, Illinois.

"ART. III. That value of extra or omitted work shall be computed by architect and shall be added to or deducted from contract price. In case of dissent, valuation shall be referred to an arbitrator, as provided in article IX.

"ART. V. Should the Contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, the Architect shall be at liberty, after five days' written notice to the Contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the Contractor under the contract; and if the Architect shall certify that such refusal, neglect or failure is sufficient ground for such action, the Owner or the Architect shall also be at liberty to terminate the employment of the Contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work comprehended under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the Contractor he shall not be entitled to receive any further payment under this contract until the said work shall be wholly fin-

ished, at which time, if the unpaid balance of the amount to be paid under his contract shall exceed the expense incurred by the Owner in finishing the work, such excess shall be paid by the Owner to the Contractor, but if such expense shall exceed such unpaid balance, the Contractor shall pay the difference to the Owner. The expense incurred by the Owner, as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such fault, shall be audited and certified by the Architect, whose certificate thereof shall be conclusive upon the parties, provided, however, if said Owner or Contractor shall dispute the justice of any of said Architect's decisions, then, either of them may have such disputed matter referred to arbitration, under Article IX of this Agreement, by serving notice of his demand therefor upon the other party within three days after receiving notice of such decisions.

"ART. VI. The Contractor shall complete the several portions and the whole of the work embodied in this Agreement by and at the time or times hereinafter stated, to wit: tile for first floor to be delivered within four weeks, and tile for the remaining floors and roof to be furnished as fast as required, partitions to be set as rapidly as the progress of building permits. Entire work to be completed within fifteen days after roof is on building.

"Time is an essential part of this Agreement, and if the Contractor's work is not in readiness as the condition of the building requires, or is not completed on or before the dates mentioned in this Article, or the extension of the same, as provided in Article VII, the Contractor shall forfeit to the Owner ten and 00-100 dollars for each and every day such work is delayed or remains unfinished, as agreed and liquidated damages.

"ART. VII. Should the Contractor be obstructed or delayed in the prosecution or completion of his work by the act, neglect, delay or default of the Owner, or the Architect, or of any other contractor employed which may happen by fire, lightning, earthquake or cyclone, or by the

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abandonment of the work by the employes during a general strike, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid; but no such allowance shall be made unless a claim therefor is presented in writing to the Architect within twenty-four hours of the occurrence of such delay. The duration of such extension shall be certified to by the Architect, but appeal from decision may be made to arbitration, as provided in Article IX of this contract.

"ART. VIII. The Owner agrees to provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work, and in the event of failure so to do, thereby causing loss to the Contractor, agrees that he will reimburse the Contractor for such loss; and the Contractor agrees that if he shall delay the material progress of the work so as to cause any damage for which the Owner shall become liable (as above stated), then he shall make good to the Owner any such damage. The amount of such loss or damage to either party hereto shall, in every case, be fixed and determined by the Architect, subject, however, to the right of arbitration, as provided in Article IX of this contract.

"ART. IX. Any controversy or dispute arising under this contract shall be settled by the Architect, whose decision shall be final and binding upon the parties hereto, except that in the case of a dispute as to the value of extra work, or of work omitted, either party to this contract may appeal from the Architect's decision to arbitration, and to that end it is agreed that any said appeal shall be submitted to arbitration in the following manner, viz.:

"Either party desiring to arbitrate shall serve a notice on the other party, stating his grievance and his intention of appealing to Charles Eiker, of the Pioneer Fire Proofing Construction Company, who is hereby chosen and agreed upon as arbitrator in any such controversy.

"If said Arbitrator is unable, or refuses to act, then unless the parties hereto shall agree in writing upon an-

other Arbitrator within three (3) days after notice that the appointed Arbitrator cannot serve, then either party to this contract may apply to the President of the Chicago Architects' Business Association to appoint an Arbitrator, and any member of the Arbitration Committee of the Chicago Architects' Business Association, so appointed by the President of said Association, shall have the authority to act as Arbitrator under this contract. The Arbitrator named above, or his substitute so chosen and constituted shall have all the powers conferred on arbitrators by the Statutes of Illinois, and his ruling shall be final and conclusive as to all questions submitted to him for arbitration. Each party shall pay one-half the fee of the Arbitrator, in accordance with the scale of fees established by the Arbitration Committee of the Chicago Architects' Business Association.

"ART. X. It is hereby mutually agreed between the parties hereto that the sum to be paid by the Owner to the Contractor for said work and materials shall be \$3,969.00 (thirty-nine hundred sixty-nine and 00-100 dollars). Additional three tile partition to be erected for $8\frac{1}{2}$ cents and omitted for 8 cents per superficial foot, actual measurement, subject to additions and deductions, as hereinbefore provided, and that such sum shall be paid in current funds by the Owner to the Contractor in installments, upon written certificates of the Architect that payments have become due. Each certificate shall represent 85 per cent. of the Architect's estimate of the value of the labor and materials incorporated in the building since preceding certificate was issued. The 15 per cent, reserved, shall be payable when the final certificate is issued.

"If so decided on or before August 1, 1899, the Contractor agrees to put in the concrete filling, as specified, and to furnish and lay floor and roof-steps for an additional amount of \$800.

"The final payment shall be made within thirty (30) days after this contract is fulfilled.

"If, at any time, there shall be evidence of any lien or

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claim for which, if established, the Owner of the said premises might become liable, and which is chargeable to the Contractor, the Owner shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify him against such lien or claim. Should there prove to be any such claim after all payments are made, the Contractor shall refund to the Owner all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the Contractor's default.

"ART. XI. It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials.

"In witness," etc.

Signed:

"EMPIRE FIRE PROOF COMPANY, [SEAL]

J. A. Hammett.

ESTATE OF CHARLES COMSTOCK, [SEAL]

Per

WILLIAM C. COMSTOCK, [SEAL]

ALICE J. COMSTOCK, [SEAL]

GEORGE S. BAKER, [SEAL]

Trustees."

MCARDLE & MCARDLE and DUNN & HAYES, for appellant.

GEORGE S. BAKER and JAMES S. MURRAY, for appellees.

MR. JUSTICE SMITH delivered the opinion of the court.

The principal question presented by this record is whether or not the defendants, appellees, are liable personally in covenant on the contract declared on.

In solving this question we must first consider what is the meaning and intent of the contract. If the intention be to bind the defendants personally by the contract, then the defendants are liable. If on the other hand the clear intent and meaning is to bind the trust estate and thereby to create an equitable lien or charge thereon, which may be enforced in equity, the defendants are not personally liable.

By the express terms of the document it is an agreement between appellant and the "Estate of Charles Comstock, party of the second part, hereafter designated the 'Owner.'" The names of the defendants nowhere appear in the contract except in the signatures thereto. The mode of signing the contract corresponds with the first clause which designates the contracting parties. The name of the appellant company is signed by J. A. Hammett, who appears to be an officer of the company. The second party named in the first clause of the contract is then signed as follows:

"ESTATE OF CHARLES COMSTOCK [SEAL]

Per

WILLIAM C. COMSTOCK, [SEAL]

ALICE J. COMSTOCK, [SEAL]

GEORGE S. BAKER, [SEAL]

Trustees."

It clearly appears from the averments of the declaration that the defendants, who were trustees of the Estate of Charles Comstock, were about to erect a fire-proof building at the corner of Sherman avenue and Davis street in Evanston, Illinois, and that Charles R. Ayars had prepared specifications and drawings therefor as their architect. For that purpose the contract in question was entered into, which provides that the contractor (appellant) under the direction and to the satisfaction of Ayars as architect, should provide the materials and perform all the work mentioned in the specifications or shown on the drawings for the fire-proofing work for the four-story brick and steel building mentioned, in consideration of the agreements of the owner therein made. Running through all the provi-

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sions of the contract the covenants and stipulations are in terms between the contractor and the owner. The contract mentions no covenant or agreement between the contractor and the defendants. It clearly appears, therefore, that the defendants were acting as trustees and not as individuals, in a trust capacity, and not for themselves personally. This appears from the situation of the parties and the surrounding circumstances appearing from the averments of the declaration as well as from the contract itself. The clear intent and meaning of the contract is that the defendants agreed in their capacity as trustees of the Estate of Charles Comstock, in as far as they could legally bind the estate, but without assuming any personal obligation whatever, for it clearly appears that they intended to charge the trust estate and not themselves, and that appellant accepted the responsibility of the trust fund alone. It is true that the "Estate of Charles Comstock" is not a legal entity, capable of suing or being sued, nor is it a person or corporation. But that is not decisive of the question. Such an estate is known to equity, and contracts relating to trust estates may be made by trustees and may be enforced in equity.

As stated in *Sperry, etc., v. Fanning et al.*, 80 Ill., 371, cited by appellant: "It will also be observed that there is a clear and marked distinction, in all the authorities, between the agreement of an agent who describes himself as contracting for a principal, and the covenant of a principal who contracts by and through an agent. The former may be regarded as the personal contract of the agent, while the latter may be held to be the undertaking of the principal."

In the above case *Sperry* was the guardian of *Henry W. Kingsbury*, a minor, who owned the premises upon which the buildings were erected. The agreement was made between *Fanning & Co.*, plaintiffs, on one part and *Sperry* as guardian, on the other part, and it was executed by the defendant: "*Anson Sperry*, guardian of the estate of *Henry W. Kingsbury*." The court say that it will be observed that the contract was not made in the name of the

ward by a guardian or agent, and held that the addition of the words "guardian," etc., were a mere matter of description, and held Sperry liable on the contract on the ground that he executed the contract in his own name, not in the name of the ward, and did not assume to bind the ward, and did not limit the liability of the defendant by a provision that the plaintiffs should be paid from the assets belonging to the ward in his hands as guardian.

In the case under consideration, the contract was, as we have seen, made in the name of the trust estate, and every provision of the contract, as well as the manner of signing it, manifests the intention of the parties to bind the trust fund alone. Every fact and circumstance set out in the declaration rebuts the idea that the defendants assumed any personal responsibility for the work, but, on the contrary, show that the defendants contracted in the name of and for the estate and that plaintiff accepted the trust fund as security for the work and materials.

The case of *Johnson v. Leman et al.*, 131 Ill., 609, holds that a person employed by a trustee to render services useful to the trust estate, without the order of the court, when the trustee does not profess or undertake to create any lien on the estate, and does not stipulate against his personal liability, must look to the trustee, and not to the estate. The court was not considering a case, like the one at bar, where there was an express charge upon the trust property created by the contract. The attempt there was to enforce a charge upon the trust property, upon the ground that appellant had rendered beneficial services to the trust estate under a personal contract with the trustee. This alone was held to be an insufficient ground for holding the trust fund liable.

The law is well settled that where one party makes a general contract with another for any lawful purpose, the addition of the words "trustee" or "as trustee" to his name do not relieve the party from personal liability. Where, however, it clearly appears that the contract is made for the benefit of a trust fund, and payment is to be made out

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of that fund, as in this case, or where a church corporation or other similar corporations, acting by trustees, make contracts, such fund, or such corporations are bound by the contract, and not the trustee, unless he has exceeded his authority as such.

In entering into contract relations like the one under consideration both parties are vitally interested in the character and terms of the agreement. If the plaintiff was unwilling to accept the fund as security for its payment, it should have insisted upon a personal contract with the parties acting on behalf of the fund. On the other hand, trustees executing a trust may be unwilling to accept a trust and enter into any contracts relating thereto, if he is required to assume a personal liability. Trustees have the right to bind the trust fund and that alone, and may make their contracts accordingly. In our opinion the contract under consideration does not bind the trustees personally and it must be so construed. *Fowler v. Mutual Life Ins. Co.*, 8 Hun (N. Y.) 195; *Thayer v. Wendell*, 1 Gallison, 37 (U. C. C.).

It follows, in our opinion, that the defendants cannot be held upon the award alleged in certain counts of the declaration. The award is alleged to have been made by Charles Eiker under certain provisions of the contract. If there is no personal liability created by the contract, there can be no personal liability fastened upon the defendants by any thing done under and in pursuance of the terms and provisions of the contract, unless it appears that defendants either directly or constructively waived the contract and assumed such personal liability. Nothing of that character is averred in connection with the making of the award.

The award does not find that the defendants are personally liable for the amount. There is nothing in the award indicating that the arbitrator intended to find them personally liable for the amount of the award.

The judgment of the court below is affirmed.

Affirmed.

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Leon Tyblewski, et al., v. Svea Fire & Life Assurance Company, et al.**Gen. No. 11,904.**

1. **ARBITRATION AWARD**—*presumption in favor of.* Courts look with favor upon arbitration as a method of settling disputes and every presumption in favor of the validity of an award will be entertained.

2. **ARBITRATION AWARD**—*what will not justify disturbance of.* A court of equity will not disturb the amount of an award merely because the evidence heard by the arbitrators would appear to justify the allowance of a different amount; some showing of fraud, accident or mistake is essential.

Bill to set aside award. Appeal from the Superior Court of Cook County; the Hon. JESSE HOLDOM, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1904. Affirmed. Opinion filed July 11, 1905.

Statement by the Court. Appellants, as complainants in the Superior Court of Cook county, filed a bill to set aside an award on a fire loss on a stock of merchandise, and for an apportionment of the loss among the twenty defendant companies who had issued to complainants policies of insurance on their stock of merchandise, and for an accounting.

The policies of insurance were all of the so-called "standard" form and contained the following provision:

"In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and the company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss."

The twenty defendant companies prior to June 30, 1903, issued these policies of insurance to Tyble Bros. & Co., a

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firm composed of two individuals, the complainants, who manufactured canvas and leather satchels and novelties, mostly of a cheap grade. The stock which complainants had on hand and covered by the policies was damaged by fire on June 30, 1903. After the fire complainants made a list of the property "damaged or destroyed" and a disagreement arose between the parties as to the loss and damage. On July 29, 1903, an appraisal agreement to determine the amount of such loss and damage as provided in the policies was entered into between complainants and the defendant companies. Complaints chose Julius Kiper, an active member of the firm of L. Kiper & Sons, who were manufacturing leather goods, as their appraiser. The companies named Louis Lapiner, who followed the business of adjusting fire losses for the assured. Prior to engaging in the adjusting business Lapiner had been in the general dry goods business for about twenty years and was familiar with the character and value of the goods described in the policies. Mr. Kiper and Mr. Lapiner agreed upon Mr. R. W. Owen of the firm of Lanz, Owen & Co., manufacturers of leather and canvas goods, satchels, etc., as umpire. Complainants and Kiper desired, for various reasons, that the appraisal be completed as soon as possible, and to avoid delays in submitting matters to Mr. Owen, the umpire, it was agreed at a conference of the appraisers and umpire that they should all make an examination of the amount of loss and damage at the same time; that each should take a list of the goods "damaged and destroyed" furnished by complainants and examine such goods and all evidence of loss, and by this method Mr. Owen might decide without delay in case of disagreement of the appraisers. Accordingly the umpire and appraisers went to complainants' place of business each day for eight or nine days and made the examination of the property listed, each man by himself, lot by lot, until they finished the list. Whenever a dispute arose between the appraisers as to the damage to any lot the umpire put down his own estimate on his schedule without their interposing in the matter. The complain-

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ants were present most of the time, making suggestions and were fully heard. On August 8, 1903, the umpire and appraisers met for a final consideration as to the amount of loss upon the various items, and to make their award as to the aggregate loss. They made an award finding that the sound value of the stock of merchandise was \$14,947.52, and that the loss and damage on the same was \$4,978.48. Complainants filed their bill to set aside the award, and on hearing the Superior Court of Cook county dismissed complainants' bill for want of equity at complainants' costs, and complainants appeal from this decree.

STEPHEN A. FOSTER and E. C. LINDLEY, for appellants.

JOSEPH E. PADEN, OSCAR A. KROPF and GEORGE A. FOLLANSBEE, for appellees.

MR. JUSTICE SMITH delivered the opinion of the court.

The numerous grounds of attack upon the award made by the bill may be classified as follows: *first*, that neither the appraisers nor the umpire made a full examination of the damaged goods or of the books of complainants, and did not give complainants proper opportunity to be heard touching the loss, and that they ignored and disallowed all loss for stock totally destroyed, and made their award on the damaged goods for an amount much less than the amount of loss they knew complainants had suffered; *second*, that Lapiner, the appraiser selected by the defendant companies, was not a competent and disinterested appraiser, but was prejudiced, dishonest and of bad standing and reputation, and that his character was well known to the defendant companies, but not to complainants, and that the companies selected Lapiner for the purpose of preventing a fair and impartial award; *third*, that Lapiner induced Kiper to join him in selecting as umpire Mr. Owen, who was one of complainants' principal competitors and not a proper person to act as umpire on the loss; *fourth*, that Lapiner prevailed upon Kiper to sign the award by assuring him that the companies would waive the award and agree to a

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friendly action at law, if complainants were dissatisfied, and also by threatening Kiper that if he did not sign the award he, Lapiner, and Owen would sign an award for a much less sum of money; and *fifth*, that the umpire and appraisers agreed among themselves to charge exorbitant fees for their services.

In our opinion the evidence fails to sustain any of these charges. The evidence is voluminous and conflicting. To analyze it thoroughly would require an extended opinion, and we are not justified in taking the necessary time. The support of the bill, in the evidence, must be found to be in the testimony of Leon Tyblewski, quite largely. The various statements of this witness, however, are contradicted by so many witnesses and his conduct during the appraisal, and subsequent thereto, was of such character that little, if any, weight or credence can be given to his testimony. We think the evidence preponderates decidedly in favor of the defendants, and that no ground is shown either upon the merits of the award or in the conduct of the umpire and appraisers, or their character, to justify a court in disturbing the award. Courts look with favor upon arbitration as a method of settling disputes, and every presumption in favor of the validity of an award will be entertained. *Merritt v. Merritt*, 11 Ill., 565; *McDonald v. Arnout*, 14 Ill., 57; *Root v. Renwick*, 15 Ill., 461.

The umpire and appraisers were selected because of their special knowledge of the particular line of business in which complainants were engaged, including the values of the different kinds of stock carried in that business. They were expected to make their own estimates. As said in *De Groat v. Fulton Fire Ins. Co.*, 4 Robertson's Reports (N. Y.) at page 510: "Such appraisers were at liberty to arrive at a conclusion in regard to the value of the articles they were called upon to estimate in such way as they thought proper; they were not bound to the strict judicial investigation of an arbitration." To the same effect is the case of *L. & L. & G. Ins. Co. v. Goehring*, 99 Penn., 13.

It is urged that the appraisers and umpire refused to

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examine or consider the books of complainants and that these books constituted the best evidence of the amount of loss sustained by complainants. As to this contention the evidence of the parties is conflicting, with a preponderance, we think, against the averments of the bill. It appears that complainants with some reluctance did place their inventory book in the hands of Kiper, the appraiser selected by them, and that they submitted their day-book, journal and ledger also to Kiper, who went through them in a casual way, finding an entry therein which aroused his suspicion. Owen and Lapiner, however, were not given an opportunity to examine the books, as appears from their testimony. However this may be, if it be assumed that the appraisers rejected the books as evidence of the amount of loss, that action would not afford ground for serious criticism of the appraisers, for as said in *Root v. Renwick*, 15 Ill., 461: "We will not, therefore, presume fraud in the arbitrators, from the fact that they rejected evidence in relation to an issue before them, but will presume that other evidence had so far settled that inquiry as to render further proofs unnecessary."

It is held in *Remelee v. Hall*, 31 Vt., at page 586: "Arbitrators are not bound to follow even what they themselves deem the strict rules of law, unless it be a condition of the submission that they shall do so, and when the submission contains no such conditions, courts will never set aside an award or refuse to enforce it because the arbitrators have not followed strictly legal rules in hearing and deciding a case, unless it be shown that thereby manifest injustice has been done." And see *Hall v. Norwalk Fire Ins. Co.*, 17 Atlantic Reporter, 359. The submission in this case contained no provision that the appraisers and umpire should follow strictly legal rules in their appraisal of the loss sustained by complainants, and it is evident, as we have suggested above, that the parties intended to rely upon the personal information, investigation and judgment of the appraisers and umpire.

Appellants claim that the court erred in excluding the

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testimony of Leon Tyblewski and the books of appellants on the question of the loss sustained by appellants. These books were received in evidence by the court as being the books which the appraisers refused to examine according to complainants' testimony, but were not received for the purpose of showing the actual amount of goods on hand at the time of the fire, June 30, 1903. Conceding that this evidence would have tended to show that the appraiser had fixed a smaller amount for goods totally destroyed than was shown to be on hand by the books and the testimony of Tyblewski at the time of the fire, a court of equity would not set aside the award for that reason alone. To do so would be to substitute the judgment of the chancellor in place of the judgment of the appraisers and umpire, the judges chosen by the parties, and make the award the commencement, not the end, of litigation. The parties are bound by the judgment of the arbitrators unless it is a corrupt judgment, and a court of equity has no right to annul their award because it thinks it could have made a better. *Burchell v. Marsh*, 17 How., 344. Unless, therefore, the court could set aside the award on the grounds of fraud or misconduct of the arbitrators, the excluded evidence could not be availed of by complainants for the purpose for which it was offered. Our conclusion is that, under the circumstances of this case, appellants were not injured by the exclusion of the evidence for the purpose for which it was offered. That the inadequacy of an award may be, under certain circumstances, an important factor and entitled to consideration where it is palpable, and produces a conviction that the award was the result of corruption or bias, is not doubted. Many authorities so hold, but this is not such a case, and we cannot conceive how the receiving and consideration of the evidence offered in this case, on the question of the amount of loss, could have affected in any way the judgment of the court. On a hearing of an equity case "before an appellate tribunal, the question is not so much as to whether the lower court ruled properly upon this or that question as it is in cases at law, but whether,

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upon the whole record, the decree is right." Flaherty v. McCormick et al., 123 Ill., 533.

While we do not intend to be understood as giving our approval of everything the appraisers did, we do not find that there was any such irregularity or misconduct in the proceedings of the appraisers, either jointly or severally, as would justify the court in setting aside the appraisal. There is no doubt that the umpire decided the points of difference between the appraisers, and his award having met the approval of the appraisers and having been signed by them, their judgment is conclusive. It is not necessary that it conform to what would have been the judgment of the court. It is sufficient that it was arrived at in pursuance of, and in substantial conformity to, the agreement voluntarily entered into by the parties. Agreeing as we do with the findings of the decree and the final disposition of the cause by the Superior Court, the decree is affirmed.

Affirmed.

Henry D. Laughlin, et al., v. David S. Geer.

Gen. No. 12,406.

1. **DIRECTORS**—*power of removal vested in, construed.* The power of removal vested by statute in the directors of a corporation does not extend to the removal of one of their own number.

2. **BY-LAW**—*authorizing removing of a director by the directors, invalid.* A by-law giving the directors power to remove one of their number in specified contingencies is illegal and void.

3. **INJUNCTION**—*lies to restrain removal of director.* An injunction lies at the instance of a director to restrain the board of directors of which he is a member from removing him from office.

Appeal from interlocutory order granting injunction. Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1905. Affirmed. Opinion filed July 11, 1905.

Statement by the Court. This is an appeal from an order granting an interlocutory injunction entered on

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March 13, 1905. Notice of the application for the order was given to the defendants Henry D. Laughlin and Smith E. Allison. No notice was given to the other defendants, Owen H. Fay, John G. Sanborn and H. M. Perry. The motion was heard upon the verified bill of complaint and the verified answer of Smith E. Allison.

From the bill and answer it appears that the National Hollow Brake Beam Company is an Illinois corporation; and that prior to the dates hereinafter mentioned the corporation had adopted the following by-law, designated as section 12, article 11 of its by-laws:

"Sec. 12. If any member of the board of directors shall be guilty of fomenting or encouraging litigation against the company, or become disloyal to its interests; or who shall wilfully and for the purpose of defeating or breaking a quorum leave the place of meeting, or remain away from a meeting of the board, or who shall persistently use his office or vote to obstruct or defeat the transaction of the company's business, or for the promotion of any sinister, base or selfish purpose hostile to the company's interest or for his own gain, or who shall accept or continue to hold the office of director in any company or corporation in litigation with this company; anyone so offending or acting or situated shall be deemed an unfit person to be elected to or to longer hold the office of director in this company, and may be by the board removed from the office of director for cause, and his place filled as other vacancies are filled."

On the 9th day of November, 1904, the complainant David S. Geer was elected a director of the company, and entered upon the duties of such director and continued to act as such up to the time of the filing of the bill in this case.

There was pending in the Circuit Court of Cook county a suit, wherein the company was complainant and one Edward B. Leigh and others were defendants, brought for the purpose of restraining the defendants in that suit from

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wrecking the National Hollow Brake Beam Company in the interests of the Chicago Railway Equipment Company. In that suit the complainant in this case, on December 27, 1904, filed a cross-bill wherein he alleged under oath that the National Hollow Brake Beam Company had ceased to do business, had forfeited its right to exist longer as a corporation, and prayed the court to take charge of it, wind up its affairs, to prohibit it from longer exercising its functions or franchise as a corporation. A decree was afterwards entered in that case by the Circuit Court adjudging that the defendants therein had been guilty of the acts charged against them in the bill of complaint.

On January 18, 1905, a meeting of the directors of the National Hollow Brake Beam Company was held, all of the directors being present except Leigh. The president of the company, Mr. Laughlin, reported to the directors the facts as to the filing of the above mentioned cross-bill against the company by complainant Geer and the averments and prayer of the cross-bill, and claimed that such act was an act of disloyalty to the company and to the trust reposed in him as a director, and that it was a flagrant violation of section 12 of article XI of the by-laws of the company. Thereupon the president preferred charges against Geer and moved the adoption of the following order:

“Ordered, that the report of Mr. Laughlin be received and filed, and that David S. Geer be notified in writing of the charge preferred against him, and that he is required to make answer thereto before the board at its stated meeting, to be held on the 14th of March, 1905, at 10:30 A. M. of that day, and that he then and there show cause why he should not be removed from his office of director as a person unfit to longer hold the office; and be it further ordered, that the secretary serve, or cause to be served, on Mr. Geer, by delivering to him a copy of this report and order, notice of this proceeding, more than ten days prior to said 14th day of March, 1905.

“That said motion was duly seconded by Director San-

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born, and thereupon was put to vote, and the secretary called the roll, and the vote was five directors voting in favor of said resolution, and said Director Geer voting against it, whereupon the said motion was declared adopted."

This order was adopted, all of the directors present except Geer voting in favor of it. Geer voted against it. The order was then served upon Geer and he was required to show cause before the board of directors on the day named therein.

Geer then filed the bill of complaint in this cause and obtained the injunction restraining the defendants from expelling him as a director of the National Hollow Brake Beam Company until the further order of court.

SHOPE, MATHIS, ZANE & WEBER and DE FREES, BRACE & RITTER, for appellants.

JOHN P. AHRENS, for appellee.

MR. JUSTICE SMITH delivered the opinion of the court.

Appellants contend that the by-law in question is valid under the statute, and at common law; and secondly, that a court of equity is without jurisdiction to enjoin the proceedings of the board of directors.

Section 6, chapter 32, of the statute provides that "the directors or managers * * * may remove any officers when the interests of the corporation shall require." The question arises under this statute, and the facts set forth in the pleadings, whether a director of a corporation is an officer of the corporation, and may be removed from office by the board of directors, under this provision of the statute. In our opinion he is an officer of the corporation, but he is not such an officer as may be removed under the power given by the statute.

The officers of a corporation formed under the act are declared to be, in the above mentioned section, "a president, secretary and treasurer, and such other officers and

agents as shall be determined by the directors and managers." These are the officers referred to as subject to removal in the subsequent clause of the section above quoted. By no reasonable construction of the language of the section can it be made to include the directors as subject to removal by the directors or managers. The directors of incorporated companies are the representatives of the stockholders selected by them under a right guaranteed by the constitution. Article XI of the constitution provides "that in all elections for directors or managers of incorporated companies every stockholder shall have the right to vote in person or by proxy the number of shares owned by him, for as many persons as there are directors or managers to be elected, or to cumulate said shares and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them on the same principle among as many candidates as he shall think fit; and such directors or managers shall not be elected in any other manner." Clearly the object of this provision was to guard the rights of minority stockholders in corporations organized under the laws of this state. The legislature had this constitutional provision in mind in adopting our General Incorporation Act. The language of section 6 of the Act clearly discriminates the directors from the general officers of a corporation. Directors are charged with the exercise of the corporate powers and as a part of those powers may choose or appoint officers or agents, who may be removed by them when the interests of the corporation require. But the board of directors may not nullify the constitutional right of a stockholder to choose whomsoever he may think proper to represent him on the board of directors. If a board of directors could legally remove a member either with or without a by-law, such as was adopted by the National Hollow Brake Beam Company and under which the defendants were assuming to act, a power most dangerous to the minority stockholders would be lodged with the majority stockholders which would enable them through the action of the directors

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chosen by them to re-constitute the entire directory of a corporation as completely as if they owned every share of stock. This is not their right, nor have they this power, under the law of this state. We do not doubt that the complainant, being a director of the National Hollow Brake Beam Company, is an officer of that company in a broad and comprehensive sense, but he is not such an officer as is contemplated in that clause of the statute conferring the power of a motion.

In Cook on Corporations, vol. 2, sec. 711, the author says: "The term of office of director is usually fixed by the charter of the corporation or the statutes applying to it. Such being the case, a director having been elected is entitled to hold his position until the expiration of his term of office. He cannot be turned out either by the stockholders, or the directors, or by a court. Sometimes, however, the charter, statutes or by-laws authorize and empower the stockholders to remove directors at any time."

As we have seen no such power is given in the statute.

If the board of directors of a corporation organized under the laws of this state have not the power to remove a director duly elected and serving, it has no power to adopt a by-law for that purpose. The section of the by-laws, therefore, under which the defendants were proceeding to remove the complainant is, in our judgment, void.

The fact that this section of the by-laws was adopted by a majority vote of all the stockholders of the company does not make it binding upon the complainant, by the principle of estoppel, for he is not shown to have participated in its adoption, or to have assented to it. Hence, *People v. Sterling et al.*, 82 Ill., 457, cited by appellants, is not in point.

In *People v. Higgings*, 15 Ill., 110, cited by appellants, the question was presented as to whether the trustees of the Illinois State Hospital for the Insane had the power to remove the medical superintendent of the institution, and it was held that the power was conferred upon the board of trustees. That, however, is a very different question from the one now under consideration, and the decision in that

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case cannot be regarded as an authority applicable to this case.

Without stopping further to discuss the authorities cited by appellants in detail it must suffice to say that they relate to different kinds of corporations from the one in question, or to the amotion of other officers than directors in a stock company, or decide different questions from those presented in the case at bar.

We entertain no doubt that a court of equity has jurisdiction to prevent the illegal action of the board of directors contemplated in the proceedings to remove complainant. If carried out to its final conclusion it would result in a continuing injury to complainant and a continuing deprivation of his right in the future to sit as a member of the board of directors. A court of equity has the authority to interpose by its restraining power, and to give the preventive relief proper in such cases. *Brunnenmeyer v. Buhre*, 32 Ill., 183.

The order granting the injunction is affirmed.

Affirmed.

Northwestern Traveling Men's Association v. Rachel L. Raphael.

Gen. No. 12,426.

1. *INSURANCE ORGANIZATION—when will not be enjoined from disposing of emergency fund.* Equity will not enjoin an insurance organization from making disbursements from an emergency fund where no fraud is charged and where the purpose of the proceeding is to hold the fund intact pending a trial to see if such fund will not be required to answer a decree or judgment which the complainant hopes to obtain.

Appeal from interlocutory order granting injunction. Appeal from the Superior Court of Cook County; the Hon. MARCUS KAVANAGH, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1905. Reversed. Opinion filed July 14, 1905.

Statement by the Court. This is an appeal from an interlocutory injunction order, restraining appellant from disposing of or paying out its emergency fund.

On May 1, 1905, appellee filed her bill of complaint against appellant in the Superior Court of Cook county, alleging that one Philip L. Raphael, who died March 18, 1903, was at the time of his death a member in good standing of the appellant; that appellant is an Illinois corporation not for pecuniary profit, organized under the laws of 1872, and claiming that under the laws of 1893 it became and is a fraternal beneficiary society; that appellee, as the beneficiary named by the said Raphael, upon his death became entitled to all the benefits of his certificate of membership. Appellee alleges that the association, by force and virtue of its constitution and by-laws, was obligated to pay appellee, as beneficiary, the sum of \$4,000 upon the death of said Raphael. Appellee sets forth in her bill such portions of the constitution and by-laws of the association as she thinks are material to the decision of the question of the liability claimed. After setting forth the portion making provision for the levying of an assessment for a specific amount on each member, to pay the death loss of a deceased member, the following portions of the constitution and by-laws applicable to this case are set forth, viz.: Section 2 and paragraphs 1, 5, 6 and 7 of section 4 of article 5 of the constitution, as follows:

“Sec. 2. Upon proof of death of any member of this association, which shall be satisfactory to the Board of Directors, they may order an assessment against each member of the association, in accordance with the assessed member's grade and denomination of his certificate or certificates (as provided in Sec. 1, Art. V) and the denomination of the deceased member's certificate or certificates and shall order paid, the amount collected upon such mortuary assessment to the person or persons entitled thereto the amount of payment to be made upon any membership certificate not to exceed \$4,000, \$3,000, \$2,000 or \$1,000, as

determined by the denomination of certificate or certificates in force, and held by the member at the time of his death and recorded on the books of the association, and the benefits accruing from the association shall be paid in the order hereinafter named and not otherwise, to-wit:

First. To the person or persons, if they shall survive him, to whom the deceased member, in his application for membership, or in the form prescribed by said association, shall have directed the same to be paid.

Sec. 4. For the purpose of providing and maintaining an emergency fund, the Board of Directors may order an assessment, when necessary, upon each member of the association, each assessment to be equal in amount to one mortuary assessment; and the amount so collected shall be placed in the emergency fund. Such emergency assessment may be ordered by the Board of Directors at any time during the year with a regular mortuary assessment, but no emergency assessment shall be made during any month when the mortuary assessments of that month exceed four.

Sec. 5. No part of the emergency fund or interest accruing therefrom shall be paid out, or in any manner encroached upon except by an affirmative vote of not less than five members of the Board of Directors, at a regular meeting of the Board of Directors, and then only for the payment of death losses, or for the payment of indigent claims, as provided in article V, section 6.

Sec. 6. Should the amount collected, as provided in article V, section 1, be less than the prescribed limit upon any membership certificate, such deficiency may be paid from the emergency fund, if there shall be an amount of money remaining in said fund sufficient for that purpose.

Sec. 7. The Board of Directors may also, at their discretion, order one or more death losses paid by borrowing temporarily from the emergency fund, when in their opinion an emergency exists. In all cases of payment of death losses by a temporary loan from the emergency fund, the Board of Directors may order a regular mortuary assessment for each death loss so paid, and the money so collected

shall be returned to the emergency fund. When no regular mortuary assessment shall be ordered to reimburse the emergency fund for death losses paid from the same, then, with the next assessment notice, there shall be mailed to each member a receipt, giving name, membership number and amount paid in each case from the emergency fund."

Appellee alleges that proof of the death of Raphael was duly made to the association which was satisfactory to the Board of Directors, and they thereupon ordered an assessment against each and every member of the association; that a large sum of money was collected, the exact amount of which she cannot state, and that in June, 1903, she received from the association \$2,520, and in August, 1903, she received the further sum of \$40 as such beneficiary, and that there is due and unpaid to her \$1,440, with interest from August, 1903; that at the time of the death of said Raphael and at the present time the appellant association is the owner and possessed of a large sum of money and chattels of large value, including an emergency fund of \$10,000.

Appellee further avers in her bill that the membership in the association is gradually decreasing and that unless appellant is restrained from paying out or disposing of the emergency fund, the assets of appellant association, including the emergency fund, will be dissipated, and lost to complainant, and she will suffer irreparable injury and prays that appellant association make full answer and that an account may be taken of the dealings and transactions of the association in and about the death of said Raphael; that appellant association be decreed to pay to her out of its emergency fund such sum of money as may be found to be due and unpaid to her, and that appellant be restrained from paying out or in any manner disposing of the emergency fund until the further order of the court.

The bill was verified. Complainant also filed an affidavit that she feared she would suffer great injury and lose all benefits of the writ of injunction if the writ was not issued

without notice to the defendant. In support of the bill complainant also files a third affidavit in which she states wholly upon information and belief that the membership of the defendant is gradually decreasing; that many persons, the number and names of whom are unknown to her, beneficiaries of deceased members, hold claims against the defendant; that the association is likely to be dissolved at any time and that many suits will be commenced against it for the purpose of satisfying claims out of the reserve fund; that one such suit in equity has already been determined in the Superior Court of Cook county entitled Crawford v. The Northwestern Traveling Men's Association, in which the defendant has been decreed to pay a large sum of money out of its reserve fund to discharge a similar obligation to that upon which this bill is founded, and that in order to prevent the enforcement of similar decrees, the defendant will distribute among its members or otherwise dispose of its reserve fund, and that if notice was given to the defendant of a motion for an injunction, that distribution would be hastened and complainant would lose the benefit of an injunction. The injunction was ordered upon the filing of the bill, and on May 6, 1903, defendant's motion to dissolve was denied.

DOLPH, BUELL & ABBEY, for appellant.

FISHELL & BERKSON, for appellee.

MR. JUSTICE SMITH delivered the opinion of the court.

The theory of appellee's bill is that she has an equitable interest in the emergency fund in the hands of appellant association which holds the fund in trust for the benefit of its members or their beneficiaries, and that under the constitution and by-laws of appellant, appellee is entitled to have paid to her by appellant out of the emergency fund \$1,440 with interest from August, 1903.

The bill admits that upon the presentation of the proof of death of Raphael, a mortuary assessment was ordered against each and every member of the association and that

the amount of \$2,560 was collected on the assessment and paid over to her. There is no allegation that more than this amount was collected on the mortuary assessment. The bill makes no averment of any mismanagement of the trust fund by the board of directors of appellant or by any of its officers or agents, or of any threatened misapplication thereof or of anything done or proposed to be done by appellant, having for its object the perversion of the alleged trust. The bill is not framed upon any such basis for controlling and preserving the fund. The court is asked to reach into this fund and take out \$1,440 of the money and hand it over to complainant upon her general demand against appellant association which has never been established at law; and in the meantime, while the court is investigating the questions involved, that appellant shall be restrained from using the fund for the purposes for which it was created.

As a basis for this extraordinary relief it is alleged that the membership of appellant association is gradually decreasing and that the assets of appellant, including the emergency fund, will be dissipated and lost to complainant.

The trustee is not shown to have done any specific act or taken any steps inconsistent with a proper administration of the fund in accordance with the constitution and by-laws governing its management of the fund. Nor is it made to appear by the bill that appellant has refused to do any act which makes it proper for a court of equity to enjoin the appellant from using the fund as it is bound to use it under the laws by which it is governed. On the contrary it does appear that appellee is attempting by means of this injunction to obtain an unjust and inequitable advantage over other beneficiaries shown to exist, not to mention its injurious effects upon appellant. Courts should proceed with great caution in issuing writs of injunction. As said in *Lloyd v. Catlin Coal Co.*, 210 Ill., 470: "It is the duty of the court to consider the inconvenience and damage that will result to the defendant as well as the benefit to accrue to the complainant by the granting of the writ, and where the defendant's damages and injuries will be greater by

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granting the writ than will be the complainant's benefit by granting the writ, or greater than will be complainant's damages by the refusal of it, the court will, in the exercise of a sound discretion refuse the writ. Fullenwider v. Supreme Council of Royal League, 180 Ill., 621; Miller v. Cook, 135 Ill., 190; Seeger v. Mueller, 133 Ill., 86."

We are not aware of any principle of equity jurisprudence which will justify the issuing of an injunction in such a case as this to compel an association to hold a fund pending a hearing or trial to see if it will not be wanted to answer a decree or judgment which the complainant hopes to obtain. Phelps v. Foster, 18 Ill., 309; Shufeldt v. Boehm, 96 Ill., 560.

The order granting the injunction is reversed.

Reversed.

G. L. Kidder v. Lucy Floyd Walker.

Gen. No. 12,042.

1. **FORCIBLE DETAINER**—*what judgment in, res judicata of.* A judgment in forcible detainer is *res judicata* of the breach of the condition of a lease concerning failure to surrender the premises at its termination, in an action instituted to recover liquidated damages for the wrongful withholding of such premises.

2. **RES JUDICATA**—*of what judgment is.* A judgment is *res judicata* not only of the questions actually determined in the cause but of all questions which might have been heard and determined thereunder.

Action of **assumpsit**. Appeal from the Circuit Court of Cook County; the Hon. FREDERICK A. SMITH, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed July 17, 1905.

Statement by the Court. Appellee by written lease demised certain premises to appellant for the term of one year ending April 30, 1901. The lease provided that appellant should pay \$5 per day for the time he might withhold possession after the end of the term, and should not

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sublet the premises or any part thereof. On the trial appellee put the lease in evidence. She also offered and the court received in evidence the proceedings in a forcible detainer suit brought by her against appellant and one Oblander, in which judgment for the possession of said premises in favor of appellee was entered June 4, 1901. The evidence tends to show that the possession of said premises was not surrendered to appellee until June 10, 1901, and that the premises were then out of repair. The evidence further tended to show that it reasonably cost appellee \$20 to repair the premises, and that she was not able to obtain another tenant until October 15, 1901. Judgment was rendered upon the verdict of the jury, for the sum of \$125, and thereupon the present appeal was perfected.

J. S. DUDLEY, for appellant.

JAMES R. WARD, for appellee.

MR. PRESIDING JUSTICE BALL delivered the opinion of the court.

Appellant contends that the judgment in forcible detainer is not sufficient evidence to establish a breach of the condition of the lease concerning failure to surrender the premises at its termination; that this contention is based upon the distinction between estoppel by judgment and estoppel by verdict; that in the forcible detainer proceedings the issue was the possession of the premises, while in the case at bar liquidated damages for the detention of and injury to the premises are sought to be recovered; therefore the judgment in forcible detainer is an estoppel by verdict, and hence is conclusive as to the matters and things only which were necessarily determined by or shown to have been involved therein.

It is in evidence that the premises described in the lease and those described in the forcible detainer proceedings are the same. The real parties to each suit are the same. In the latter suit appellant appeared and disclaimed. By

that act he denied that he was withholding the possession of these premises at the time the complaint therein was filed. This question thus put in issue was necessarily involved in that action. The determination against appellant precluded him from introducing upon this trial any evidence tending to impeach or to contradict that judgment. "Where some controlling fact or question, material to the determination of both causes of action, has been adjudicated in a former suit, and the same fact or question is again at issue between the same parties, its adjudication in the first, will, if properly presented, be conclusive of the same question in the latter suit, irrespective of whether the cause of action is the same in both suits or not." *Brack v. Boyd*, 211 Ill., 293; *McKinney v. Finch*, 1 Scam., 152; *Guinard v. Hey-singer*, 15 Ill., 288; *Hanna v. Read*, 102 Ill., 605; *Tilley v. Bridges*, 105 Ill., 340; *Stone v. Salisbury*, 209 Ill., 65.

The evidence offered by appellant and excluded by the court was in relation to matters that were necessarily determined by the justice of the peace prior to rendering the judgment in the forcible detainer suit. This evidence, if competent in any action, was competent and should have been offered in the justice court. Not having been offered in that court, appellant is estopped to present it here as a defense.

It clearly appears that the actual damages suffered by appellee by reason of the default of appellant are greater than the amount of the stipulated damages as shown by the verdict.

Substantial justice having been done in this case, and no reversible error appearing in the trial, we affirm the judgment of the Circuit Court.

Affirmed.

Genius v. Rayfield.

Arthur E. Genius v. Charles L. Rayfield.**Gen. No. 12,048.**

1. **SHORT CAUSE CALENDAR**—*notice required to place case upon.* The notice essential to the placing of a case upon the short cause calendar is personal notice; service by registered letter is not sufficient.

Action commenced before justice of the peace. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the October term, 1904. Reversed and remanded. Opinion filed July 17, 1905.

CHARLES A. KLOTZ, for appellant.

ALFRED F. TOMPKINS, for appellee.

MR. PRESIDING JUSTICE BALL delivered the opinion of the court.

This was an appeal by the defendant below to the Circuit Court from a judgment entered by a justice of the peace. In the Circuit Court the plaintiff below placed the case on the Short Cause Calendar. The defendant moved the court to strike the case off that calendar for want of sufficient notice. R. S. Hurd, 1903, section 95, chapter, 110, p. 1414. The motion was overruled. The defendant excepted to this ruling; and, failing to prosecute his appeal, the court dismissed the appeal and entered judgment against him for costs. He brings the case to this court.

The notice to the defendant, here appellant, that the case would be placed on the Short Cause Calendar for trial was served by registered letter only. The registry return receipts were signed in the name of appellant, but there is no evidence that they were or either of them was his signature.

We are committed to the doctrine that a notice served by sending a copy of the Short Cause Calendar, affidavit and notice by registered mail is not in compliance with the statute; that where notice is required and the mode of service is not specified, the law demands that it shall be personal. O'Brien v. Lynch, 90 Ill. App., 26.

It follows that the judgment of the Circuit Court must be and it is reversed and the cause is remanded.

Reversed and remanded.

Nellie Johnson v. William Clegg, Trustee, et al.

Gen. No. 12,064.

1. **SOLICITOR'S FEES**—*when allowance of, improper in foreclosure proceeding.* Solicitor's fees in a foreclosure proceeding cannot be included in the costs unless it is authorized by the contract of the parties.

2. **SOLICITOR'S FEES**—*when trust deed does not provide for.* Where the specific provision contained in the trust deed provides for a percentage of the principal, etc., to be allowed as a solicitor's fee, but the amount of such percentage is left blank, it is equivalent to no provision at all and that specific provision failing, a general provision for reimbursement for all expenses will not sustain an allowance of solicitor's fees.

3. **DEFICIENCY DECREE**—*when erroneous.* A deficiency decree awarded against one not personally liable for the debt is erroneous.

Foreclosure proceeding. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTTILL, Judge, presiding. Heard in this court at the October term, 1904. Reversed and remanded. Opinion filed July 17, 1905.

Statement by the Court. In November, 1901, George Johnson and appellant, his wife, executed a trust deed upon premises therein described to secure the payment of the sum of \$2,000, evidenced by three promissory notes signed by said George Johnson. The trust deed contained these provisions:

"It shall be lawful for the said party of the second part, or his successor in trust, or the person who may be appointed by the court to execute this trust, on application of the legal holder of said promissory note . . . or either of them, to enter into and upon and take possession of the premises hereby granted, or any part thereof, and to collect and receive all rents, issues and profits thereof, and in his

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own name or otherwise to file a bill or bills in any court having jurisdiction thereof against the said party of the first part, . . . heirs, executors, administrators and assigns, to obtain a decree for the sale and conveyance of the whole or any part of said premises for the purposes herein specified, by said party of the second part, as such trustee or as special commissioner, or otherwise, under order of court, and out of the proceeds of any such sale to first pay the costs of such suit, all costs of advertising, sale and conveyance, including the reasonable fees and commissions of said party of the second part, or the person who may be appointed to execute this trust, and . . . per cent on the amount of such principal, interest and costs for attorney's and solicitor's fees, and also all other expenses of this trust, including all moneys advanced for insurance, taxes, and other liens or assessments, with interest thereon at eight per cent per annum, then to pay the principal of said note," etc.

October 15, 1902, George Johnson conveyed to appellant the undivided one-half of the premises in question. December 8, 1903, appellant filed her bill for a partition of the mortgaged premises, subject to the lien of said trust deed, making the appellees defendants thereto. This bill is still pending. January 12, 1904, appellees filed this bill of foreclosure. It is alleged therein that it is provided in said trust deed that in case of foreclosure appellees should be allowed and paid their reasonable solicitor's fees, "and your complainants complain that by the filing of this bill under this clause of said trust deed there is now due to complainants and their solicitor, John C. Trainor, herein for solicitor's fees the sum of \$200, as provided in said trust deed." The bill also referred to said partition suit. May 19, 1904, a stipulation, entitled in this cause and signed by George Johnson only, was filed herein, which provided that the sum of \$250 for solicitor's fees should be included in the amount found due by the master.

Appellant answered said bill, alleging (among other things) that she is the owner of an undivided one-half inter-

est in said premises; admits that on December 8, 1903, she filed her bill for partition, which suit is still pending; and denies that the complainants are entitled to \$200 or any sum for solicitor's fees by reason of said partition suit, or that complainants are entitled to relief, or ought to have execution against her for any deficit.

The master found, among other things, as a conclusion of law, that by the stipulation filed appellees were entitled to a lien of \$250 against the undivided half interest of George Johnson in said premises for solicitor's fees; and that the record does not authorize the allowance of a solicitor's or trustee's fee against the undivided one-half interest of appellant in said premises. Appellees filed objections before the master to this conclusion, which objections were ordered to stand as exceptions in that particular to the master's report. In the decree of the court these exceptions to the master's report were sustained, and the sum of \$250 was allowed appellees for solicitor's fees necessarily expended by the trustee in and about the execution of his trust, to be taxed as costs; and in case of a deficit on sale said appellee Wilkinson was to have execution for the same against appellant and said George Johnson.

From this decree the present appeal was perfected.

FREDERIC R. DEYOUNG, for appellant.

JOHN C. TRAINOR, for appellee.

MR. PRESIDING JUSTICE BALL delivered the opinion of the court.

A solicitor's fee in a foreclosure proceeding cannot be included in the costs unless it is authorized by the contract of the parties. In *Conwell v. McCowan*, 53 Ill., 364, it is decided that "The court erred in allowing for money advanced by the solicitor and his fee. They were not statutory fees or charges." In *Eimer v. Eimer*, 47 Ill., 375, the Supreme Court say: "Under the practice of our courts, statutory costs alone are taxable, and attorney's or solicitor's fees not being of that character, this court has repeatedly

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held that it was error for the Chancellor to allow such fees or to decree their payment."

In *Clawson v. Munson*, 55 Ill., 394, where the mortgage contained a clause that in case the sum of money received thereby was not paid according to the tenor and effect of the notes, the mortgagor would "pay all attorney's fees for the collection of said sum of money," and upon *scire facias* to foreclose the mortgage the trial court had included the sum of \$110 as such reasonable attorney's fee, the Supreme Court declared: "We can only say, that the appellants provided, by their express agreement, in the mortgage, for all the consequences that have followed, in case of default in prompt payment, and that they could have avoided all hardships by paying the note at maturity. It is not in the power of the court to relieve a party from the force and consequences of his own agreement."

In *Atwood v. Whittemore*, 94 Ill. App., 294, in a foreclosure proceeding the mortgage allowed \$100 for attorney's and solicitor's fees. It also contained another provision, that "said grantor shall pay all costs and attorney's fees incurred or paid by said grantee or the holder or holders of said note, in any suit in which either of them may be plaintiff or defendant, by reason of being a party to said trust deed or a holder of said note, and that the same shall be a lien on said premises, and may be included in any decree ordering the sale of said premises, and taken out of the proceeds of any sale thereof." No evidence was offered to show that any costs or attorney's fees were incurred or paid by defendant in error in any suit other than in this foreclosure suit. The decree included the sum of \$500 as a reasonable solicitor's fee. Upon appeal, we reversed the decree in this regard, saying: "In the absence of statutory provision, the entire matter of decreeing an allowance of any sum as attorney's or solicitor's fees in the foreclosure proceedings, to be paid out of the proceeds of foreclosure sale, rests solely upon contract. In the absence of any contract for such allowance, it could not be made." (Citing cases.)

In *Soles v. Sheppard*, 99 Ill., 619, the mortgage provided for the payment of a solicitor's fee in case of a foreclosure. Being made a defendant in a suit to foreclose a prior incumbrance, the holder of the note filed an answer and a cross-bill. The decree gave him solicitor's fees. The court, finding that the cross-bill was unnecessary, because the foreclosure of the prior mortgage afforded him full relief, held that the allowance of solicitor's fees was reversible error.

The provision, "and . . . per cent on the amount of such principal, interest and costs for attorney's and solicitor's fees," is an agreement that nothing shall be paid for such services. No one, not even the chancellor, has authority to fill that blank. If it were filled that act would be a material alteration of the instrument and would render it void. In *People v. Organ*, 27 Ill., 27, a bond was signed and sealed with the penalty omitted. It was afterwards inserted with the consent of the principal, but without the knowledge of the sureties. The court held that the sureties were not bound, saying: "It (the bond) is then of a different tenor and is another instrument, as much so as if it was executed in a penalty for one sum and was changed to a different and larger sum."

This specific provision being of no avail, appellees cannot support the decree in this particular by any general provision contained in the deed of trust relating to costs and attorney's fees, such as "and also all other expenses of this trust."

Henke v. Gunzenhauser, 195 Ill., 130, was a foreclosure suit. The trust deed provided a solicitor's fee of \$100. It was also agreed therein "that said grantors shall pay all costs and attorney's fees incurred or paid by the said grantee or the holder or holders of said notes in any suit," etc. The decree found and allowed \$625 as a reasonable solicitor's fee. This decree was reversed by this court. Upon appeal the Supreme Court held that while \$100 was an unreasonably low solicitor's fee, it was the contract of the parties and they were bound thereby; and that the first

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clause was clearly applicable to a foreclosure proceeding and to nothing else, while the second provision referred to suits "other than a proceeding to foreclose the mortgage." The court said: "That the allowance of an attorney's fee in this State rests solely upon a contract between the parties. If no attorney's or solicitor's fee is agreed to be paid, none can be allowed, and if there is an agreement to pay a certain amount, that amount limits the allowance, and it can not be increased, though if unreasonable it may be diminished." See also *Atwood v. Whittemore, supra*.

Appellants, to sustain their contention, cite *Guignon v. Union Trust Co.*, 156 Ill., 135, (S. C. 53 Ill. App. 581). We think it is not here in point. In that case the mortgage contained this clause: "The mortgagor agrees to pay all expenses of such releases, as well as all other fees and charges of the said trust Company in executing this trust." The court held that "The Company was not a lawyer, and could not, without the assistance of a solicitor, foreclose the mortgage, and whatever expense the Company incurred in foreclosing the mortgage, reasonable in amount, would in our opinion, fall within the clause of the mortgage, *supra*, providing for fees and charges."

The decree also provides that in case a deficiency arises from the sale, appellee Wilkinson may have an execution therefor against said George Johnson and appellant. The debt is that of George Johnson only. Appellant, by reason of this indebtedness, may lose her interest in these premises, but she assumed no personal liability for this debt, and cannot be so held.

The decree of the Circuit Court is reversed and the cause is remanded.

Reversed and remanded.

Rodney B. Swift v. Nettie F. McCormick, et al.

Gen. No. 12,427.

1. INJUNCTION—*lies to maintain status quo*. Where it appears from the respective contentions of the parties that it is important that the *status quo* of the litigation be maintained, an injunction will be employed for that purpose.

Appeal from interlocutory order granting injunction. Appeal from the Circuit Court of Cook County; the Hon. JOHN L. HEALY, Judge, presiding. Heard in this court at the March term, 1905. Affirmed. Opinion filed July 17, 1905.

Statement by the Court. Appellant makes the following statement of the bill in this case:

"In the year 1902 appellees, who had for many years been the holders and owners of a large majority of the capital stock of the McCormick Harvesting Machine Company, hereinafter called the McCormick Company, and in the active control and management of its affairs as stockholders, directors and officers, that Company having sold its assets to the International Harvester Company, hereinafter called the International Company, desired to make some recognition of the faithful and efficient services of many of the employees of the McCormick Company who had been its employees and identified with its business for some years prior to the termination thereof. To that end they transferred to three of their number, appellees Cyrus H. McCormick, Harold F. McCormick and Stanley McCormick, as trustees, trust certificates representing a large amount of the stock of the International Company, to be held by said trustees and distributed among a number of the employees of the McCormick Company in certain proportions which had been determined upon and fixed by appellees. In the distribution made in execution of the trust thus created, appellant received the certificate in controversy, representing six hundred shares of the stock of the International Company.

Appellant entered the employ of the McCormick Company

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in 1880 and continued in its service up to 1902, when he entered the employ of the International Company. During his employment by the McCormick Company he occupied positions of trust and confidence with the Company and was promoted from time to time from one position to another until, during the last few years of his employment, he became one of the Company's most trusted and confidential employees. The appellees had every reason to believe that appellant during the years of his employment by the McCormick Company had rendered faithful, loyal and efficient services to it, and at the time of the distribution of the stock in question, no facts of any kind had come to their knowledge, or to the knowledge of any of them, which would lead them to believe that he had not been a faithful and loyal employee of the Company. Appellant was taken by appellees into their confidence in the matter of the proposed distribution of stock and the subsequent details of the plan were disclosed to him. It was decided by appellees that appellant should receive as his portion of the distribution of stock six hundred shares of the stock of the International Company, and accordingly on or about the 20th day of February, 1904, the certificate in controversy was duly executed on behalf of the appellees and delivered to him.

After the sale of the assets of the McCormick Company appellees became the owners of a large part of the stock in the International Company, a fact well known to appellant, who entered into the employ of the latter company in the latter part of 1902, and since that time has held an important and confidential position with said International Company.

Within a few weeks last past for the first time it came to the knowledge of appellees that appellant in the year 1903, and prior to the month of November in said year, was guilty of conspiring with sundry persons to defraud the International Company. During the summer of 1903 appellant was at the head of the experimental department of the International Company, and his advice and counsel in the matter of purchasing patent rights was relied upon by

the directors and officers of the Company. During that summer appellant recommended to the directors and officers that they should purchase from one Hadley certain patents for the sum of seventy-five thousand dollars, and thereupon said directors and officers, relying upon the advice of appellant, directed the purchase of the patents at said price.

Prior to said purchase one Willis C. Swift, brother of appellant, acting under the assumed name of Henry C. Chatfield, had obtained an option for the purchase of the Hadley patents for fifty thousand dollars. After the directors and officers of the International Company, on the recommendation of appellant, had authorized the purchase of the patents for seventy-five thousand dollars, said Willis C. Swift completed the purchase of the patents from Hadley and paid him therefor fifty thousand dollars, which was furnished by appellant. Shortly afterward an assignment of the patents was delivered to the International Company, and it paid therefor to one Charles S. Cairns, who was acting as attorney for said Willis C. Swift, the sum of seventy-five thousand dollars. Out of the amount thus paid appellant received from his brother the sum of \$19,141, which he retained for his own use and profit. The fact that appellant made a personal profit out of the transaction was unknown to the stockholders, officers and directors of the International Company.

In procuring the option to purchase the Hadley patents said Willis C. Swift acted under the direction and advice of appellant, and appellant well knew that the patents could be purchased for \$50,000, and entered into a conspiracy with his brother to purchase the patents, relying upon his influence with the officers of the International Company and in the confidence which they reposed in him to induce them to pay for the patents a sum largely in excess of the amount for which Hadley was willing to sell. The entire transaction of the purchase of the patents was a fraud upon the International Company devised and engineered by appellant for the purpose of making money for himself out of that Company.

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In May, 1902, said Willis C. Swift, acting under the same assumed name of Henry C. Chatfield, purchased from a Mrs. D. F. Lottridge a six-eighteenths interest in certain letters patent then owned by her for the sum of \$100, taking an assignment in his assumed name of Henry C. Chatfield, May 22, 1902. Afterwards appellant, acting on behalf of the McCormick Company, purchased from his brother said six-eighteenths interest in said patent and upon appellant's recommendation the McCormick Company paid for said interest the sum of \$3,250 by its check drawn to the order of said Charles S. Cairns, who was then acting for and on behalf of said Willis C. Swift, and thereupon the latter, under his assumed name of Henry C. Chatfield, transferred said six-eighteenths interest in said patent to the McCormick Company by instrument dated June 27, 1902.

Appellant, as appellees are informed and believe, received for his own use a large part of the purchase price which was paid by the McCormick Company for said Lottridge patent, and the fact that he had made a large profit out of the purchase was unknown to the officers, directors and stockholders of said company. Appellant, as appellees are informed and believe, directed his brother to purchase said Lottridge patent and furnished the money therefor with the intent and purpose of subsequently selling the same to the McCormick Company at a largely enhanced price, and appellant relied upon the trust and confidence reposed in him by the officers and directors of the McCormick Company to induce them to pay for the Lottridge patent a sum largely in excess of the price paid therefor by him and largely in excess of its real value. Said entire transaction was a fraud upon the McCormick Company devised by appellant for his own profit.

Appellant, as appellees are informed and believe, at other times in the year 1902 and in the years prior thereto, took advantage of his confidential position with said McCormick Company and of the trust and confidence reposed in him by the stockholders, directors and officers thereof, to defraud the Company in other ways.

It was well known to appellant that the gifts of stock made to the employees of the McCormick Company by the appellees were made on account of faithful, loyal and efficient service to that company. If the facts above set forth concerning the conduct of appellant in relation to the business of the McCormick Company and of the said International Company had been known to appellees at the time they gave appellant the certificate in controversy, representing six hundred shares of International Company stock, no such gift and no gift of any kind whatsoever would have been made by appellees to appellant. Appellant well knew that if the transactions by which he had defrauded the McCormick Company and the International Company, as above set forth, had been known to appellees, no gift of any kind would have been made by appellees to him. In order to receive a share in said stock distribution appellant, well knowing that said distribution was contemplated, concealed from appellees all knowledge of the various transactions by which he had defrauded said company and had betrayed the confidence of appellees and the Company's directors and officers. It was solely by reason of the concealment by appellant of the various transactions above herein set forth that appellant was enabled to obtain a share in said stock distribution. Said gift of six hundred shares of stock from appellees to appellant was obtained by appellant by fraudulent concealment on his part of facts which it was his duty to disclose to appellees. Appellant was not in fact entitled to receive any gift from appellees, and said gift was made by appellees and obtained by appellant through the fraudulent procurement of appellant.

By reason of the facts above set forth appellees have elected to revoke and rescind the said gift of six hundred shares of stock to appellant, the reasonable value of which is \$60,000."

The prayer of the bill is for a writ of injunction restraining appellant from in any manner transferring or disposing of the certificate in question until the further order of the court, and that upon final hearing it may be decreed by the

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court that the gift made by appellees to appellant was procured by fraud and concealment on the part of appellant, and that appellees have a right in equity to revoke said gift and recover said certificate, and that appellant may be decreed by the court to surrender and deliver up the certificate to appellees, or in case it shall appear that he has disposed of the certificate, that appellees may have a decree against him for its money value.

The bill is verified by the affidavit of appellee Cyrus H. McCormick, which sets forth that its allegations are true of his own knowledge, except the allegations therein stated to be upon information and belief, which allegations he believes to be true, and that the rights of appellees will be unduly prejudiced if the injunction prayed for in the bill is not issued immediately and without notice to the appellant.

Upon the bill thus verified the court, without notice to appellant, entered an order restraining appellant, until the further order of the court, from in any manner transferring or disposing of Certificate No. 4, dated February 20, 1904, known as a "McCormick Certificate of Interest in International Harvester Company Stock," representing six hundred fully paid shares of the par value of \$60,000, mentioned in said bill. From this interlocutory order the present appeal was perfected.

HIRAM T. GILBERT, for appellant.

WILSON, MOORE & MCILVAINE, for appellees.

MR. PRESIDING JUSTICE BALL delivered the opinion of the court.

The injunction in this case prevents appellant from disposing of the gift made to him by appellees until the further order of the court. In this action appellees seek to have the gift revoked and to have the certificate returned to them for alleged fraud. The state of the pleadings is such that all material facts well pleaded in the bill are admitted to be true. If these facts are established and unanswered on the

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hearing they will strongly tend to prove that appellant, at the time the gift was made, did not belong to the class of faithful employees whom appellees were desirous of and intending to reward. The circumstances of the gift are unusual, and the certificate is peculiar in some of its conditions. It is not proper for us to pass upon the merits of the case on this interlocutory appeal. The oral and printed arguments of counsel for the respective parties have convinced us that this injunction should stand until the final hearing, and that so to order will not harm the appellant beyond the reparation afforded by the injunction bond.

The decree of the Circuit Court is affirmed.

Affirmed.

City of Chicago, et al., v. Max L. Brede.

Gen. No. 12,443.

1. **MUNICIPAL CORPORATIONS**—*what powers exercised by.* Municipal corporations possess and can exercise only the following powers: (1) those granted in express words; (2) those necessarily or fairly implied in or incident to the power expressly granted; (3) those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable.

2. **BOND IMPROVEMENT FUND**—*municipality has no power to establish.* A municipal corporation has no power to create and appropriate for what is styled a bond improvement fund, the purposes of which are to pay interest charges and to purchase bonds issued by it.

Injunctive proceeding. Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the March term, 1905. Affirmed. Opinion filed July 17, 1905.

EDGAR BRONSON TOLMAN, Corporation Counsel, and FRANK JOHNSTON JR., Assistant Corporation Counsel, for appellants.

STEIN, MAYER, STEIN & HUME, for appellee; PHILIP STEIN, of counsel.

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MR. PRESIDING JUSTICE BALL delivered the opinion of the court.

In this case the Hon. Murray F. Tuley, Chancellor, who heard it in the court below, rendered an opinion in writing, in which the cause is fully stated. This opinion is as follows:

"This is a bill filed by Max L. Brede as a taxpayer seeking to enjoin the expenditure of \$140,000 included in the annual appropriation bill of the city for the year 1905 under the title, 'Board of Local Improvements, \$150,000' for 'Improvement Bond Fund,' payable from miscellaneous sources, for the purchase of improvement bonds, coupons and vouchers issued in special assessment proceedings, bearing a warrant number above 30,000, when the respective funds against which said bonds, coupons and vouchers have been issued, have been exhausted and deficiencies exist on account of delays in the collection of said special assessments, by reason of assessed property having been stricken off, etc., or purchased by the city at the annual tax sale, for default of bidders, failure to provide for the payment of special assessments against school property, pending litigation, and appeals or writs of error in special assessment cases, or by delay in the enforcement of the corresponding special assessment for any reason.

The so-called improvement bond fund appears to have been established by an ordinance passed in April, 1903:

'To prevent default in special assessment improvement bonds and lessen the cost of the construction of local improvements by special assessments.'

The fund was to be used at the discretion of the Board of Local Improvements for the purchase of improvement bonds, coupons and vouchers issued in special assessment proceedings, bearing a warrant number above 30,000 when the respective funds against which said bonds have been issued have been exhausted and deficiencies exist on account of delays in the collection of said special assessments by reason of assessed property having been stricken off to, or pur-

chased by, the city at the annual tax sale for default of bidders, etc., as stated in the appropriation item.

It appears that \$50,000 was appropriated in 1903 and the same amount in 1904.

The question in this case is: Did the city council transcend its lawful powers in passing the ordinance referred to and in appropriating \$150,000 in the annual appropriation bill of 1905?

When the right of the city council to make an appropriation of this nature is challenged, the first question is: Under what grant of power, if any, did or could the council have acted?

It is settled law that municipal corporations possess and can exercise only the following powers: (1) Those granted in express words; (2) those necessarily or fairly implied in or incident to the power expressly granted; (3) those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. *Cook County v. Samuel H. McCrea*, 93 Ill., 236.

The charter or statute by which a municipal corporation is created is its organic act.

The corporation can do no act or make any contract or incur any liability not authorized thereby, or by some legislative act applicable thereto. The corporation exists as a city solely and alone by the authority of its act of incorporation, and all acts beyond the scope of the powers granted are void. It necessarily follows that a corporation can exercise no power or can do no act which is forbidden by its charter or the statute creating it.

It is not pretended on the part of the city that there is any express grant of power to purchase local improvement bonds or to appropriate money to the use of a special fund for any of the purposes named in the ordinance.

The charter of the city provides for the making of local improvements and the manner in which the money shall be raised to pay therefor.

Section 73 of the Local Improvement Act provides that the city shall not 'be in any way liable for failure to collect

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any special assessment levied for local improvements, and that the contractor shall have no claim or lien upon the city in any event for the work done, except in the collection of the special assessment.'

It is made the duty of the city to use reasonable diligence for the collection of the assessment levied for the payment of the work and of the city treasurer to keep a separate account with each special assessment.

Section 90 of the act extends the non-liability of the city, practically in the same language, as to the payment of vouchers or bonds issued upon any such special assessment, and interest thereon. It is apparent from the whole tenor of the act that it was the intent of the legislature to prohibit the city from becoming in any way liable for the work done in such local improvements or for the payment of any vouchers or bonds issued therefor and for the collection of the money to pay for the same. The intent was to provide for a special fund to which the contractor and the bondholders could look for payment; to segregate local improvements from all other improvements and absolve the city from all liability on account thereof.

It is, therefore, evident that the power to create this special fund and to make this appropriation in question is not found in the provisions of the city charter concerning the making of local improvements. If the power exists at all, it must exist under some general grant of power, as no specific grant of power can be found to establish this 'improvement bond fund' or to make the appropriation in question.

Article 5 of the charter treats of the powers of the city council, and section 1 enumerates such powers in ninety-six separate clauses. I know of no charter or general law for the control of cities where there is such careful specification of the powers granted the municipality as is found in the act under which the City of Chicago is incorporated. Some of the powers contained in the ninety-six clauses of said section 62 are in general terms, but followed by specifications as to the cases in which and the extent to which such

general powers shall be exercised. For instance, there is conferred the general power 'to control the property and finances of the city,' 'to lay out, establish, open, grade, pave streets, sidewalks,' etc., which are followed by limitations and prohibitions as to the exercise of such general powers.

There are a great many specific provisions as to the manner in which local improvements shall be inaugurated as to carrying the same into effect by contract; the issuing of bonds in the payment of the same; the levying and collection of special assessments upon the property benefitted by such local improvements; the payment for same out of the special fund so raised; and provide in great detail a complete scheme for the making of such local improvements and the payment for the same by the property benefitted thereby.

It is evident, in the opinion of the court, that in this charter it was the intention of the legislature that these specific provisions and specifications of the charter as to the exercise of the powers conferred should be limitations upon such general grants of power.

'Where there are both special and general provisions of a charter the power to pass by-laws under the special or express grant can only be exercised in the cases and to the extent as respects those matters allowed by the charter or to the incorporation act.' Sec. 316, Dillon on 'Corporations,' 4th ed.

'The power to pass necessary by-laws is incidental, but this power is limited, not only by the terms, but also by the spirit and design of the charter and the general principles and policy of the common law.' Note Sec. 316, Dillon, and cases cited.

In the case of *City v. Cox*, 5th Ind., 38, the city charter contained a general provision that the city might create debts, but this was followed by a provision authorizing the corporation to construct wharves, water-works, etc. It was held that the general power to create a debt for the special purposes stated in the charter only, and that the term 'debts' is construed to mean specifically debts for the legitimate and proper purposes, and not for all purposes.

Under the second clause of said section 62 the power is given the city council: 'To appropriate money for corporate purposes only and to provide for the payment of the debts and expenses of the corporation.'

If the power exists, as claimed in this case, to make this appropriation and to create this 'bond improvement fund,' it must be found under the general power of appropriating money. Under the rule laid down the power to appropriate money for corporate purposes would be construed to mean to appropriate money for specified legitimate and proper municipal purposes especially enumerated in the charter.

Under this second clause the power 'to appropriate money for corporate purposes only' would seem to be intended only as a limitation as to what purposes money could be appropriated for, and not as a grant of power to appropriate money. The power to appropriate money would exist as an implied power by necessary implication, and this clause recognizes such power as existing, but limits the extent to which it can be exercised. But even construing it as a grant of power to appropriate money for all corporate purposes, can the appropriation in question be considered a corporate purpose?

It is claimed that it is a corporate purpose to keep up the credit of these special assessment bonds and not allow them, because of a shortage of funds, collected by special assessment to pay the interest or to pay the bonds in full as they mature, to become discredited and put upon the market at less than par. It is contended that besides discrediting the particular bonds, the effect has been and would be to discredit also all other bonds of the city.

The case of *Taylor v. Thompson*, in the 42nd Ill., page 9, is relied upon as giving the definition of a corporate purpose, and sustaining the contention of the city. That was a question of constitutionality of an act authorizing the Town of Odell (among others) to levy a tax to pay bounties to persons drafted in the army. The act was sustained as constitutional and authorized by the provisions of the constitution giving the legislature power 'to vest corporate

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authorities of cities, towns, etc., with power to assess and collect taxes for corporate purposes,' etc. 5th and 6th Secs., Art. Constitution of 1870.

There is a marked difference between that case and the one at bar. In the constitution there are no specifications of corporate purposes, but here the corporate purposes delegated to the city are enumerated, specified in great detail. In that case the court holds:

'A tax for corporate purposes may be defined to mean a tax to be expended in the manner which shall promote the general prosperity of the municipality which levies it; if it appears that a tax has been voted and levied with honest purpose to promote the general wellbeing of the municipality, and was not designed merely for the benefit of individuals or of a class, its collection should not be stayed by the courts.'

In this case the chief purpose of the appropriation was to provide a fund to meet the interest and so much of the principal as the special assessment tax collected fell short of the amount levied for that purpose.

It may be true that the city gets an indirect benefit in its credit and that such work, as contended for, can be let cheaper with this kind of a provision made by this ordinance for keeping the bonds in good credit, but the main object is to lend the credit of the city to aid the special assessment method of making local improvements, which the city has no power to do directly. The city could levy no tax, nor could it borrow money to pay for deficiencies in the collection of the special assessments; yet it takes moneys belonging to the general fund to meet such deficiencies.

It is, however, contended that the city does not levy a tax nor assume any obligation, but merely takes money from one fund in the city treasury to aid in the carrying out of the power given by the charter to make local improvements by special assessments, and only advances moneys which it can collect through assessments levied or to be levied.

The city raises money for corporate purposes under its charter powers 'from miscellaneous sources'; it takes this

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money raised for legitimate corporate purposes specified in its charter, and appropriated it, not for the purposes expressly authorized, but, in fact, for purposes prohibited by the spirit and intent of the charter provisions as to the making and paying for local improvements.

While it is clear that the charter contemplates that the city shall in no way become liable for the cost of such improvement or upon the bonds issued to the contractor therefor, yet the contractor, in bidding for the work, knows that in case there is not money sufficient to pay the interest on the bonds and the principal as the same become due, that the city has appropriated this \$150,000 for the fiscal year 1905 to provide against such contingency.

If the legislature had intended that the city should thus aid in making such local improvements, there can be no doubt that it would have so declared in express words in the act concerning local improvements.

It may be admitted that the scheme of a 'special bond improvement fund' to aid the city in making local improvements has been so far a success, it appearing that the money appropriated in 1903 and 1904 has resulted in making special assessment bonds, which were before at a discount, appreciate by reason of the assistance rendered by the city through this 'improvement bond fund.' It may also be admitted that the making of local improvements and the letting of contracts for the same, were benefitted by this new scheme, but the legislature has singled out the 'making of local improvements' as a special matter to be carried on without the financial aid of the city and to be paid for out of a special fund, to-wit: the amount collected by the city upon the special assessments levied for the respective improvements, and in no other way.

The most that can be said is that the city, as a corporate body, and all of its inhabitants, are incidentally benefitted by reason of the establishment of this 'bond improvement fund', but the primary object is not for the general benefit of those interested as a class in the respective improve-

ments, and to aid in making and carrying out of such respective local improvements.

It is contended that the city does not pay the interest coupons or bonds, but purchases them, relying for reimbursement upon the money to be collected upon the special assessments levied, or to be levied, for the respective local improvements. It is probable that the city has the right to reimburse itself for moneys so paid by and through the special assessments, but it by no means follows that the so-called purchase is not, except as to those liable to special assessment, in fact a payment. It makes but little difference what you call a transaction, the question is as to the effect of the transaction. If an individual gives his note for a certain amount, payable out of a special fund to be collected by him, and he afterward purchases that note, in point of law, it will come pretty near to being a payment of the note. But, whether considered as a payment or a purchase, this much is clear, that the city assumes the risk of future collections upon assessments, a risk which the law placed upon the contractor or the holder of the bond. If any part of the assessment is for any cause not collected, the loss is upon the city.

It is claimed that the ultimate loss upon assessments of this character will not average more than one-half of one per cent. There are several millions of dollars of such bonds outstanding, but the amount of the loss the city may sustain is unimportant, as the only concern of the court is as to the right to thus appropriate the public moneys, and this without regard to the amount in controversy.

The city borrows millions of dollars every year in anticipation of the collection of the annual taxes, for which it issues its certificate of indebtedness, payable only out of the taxes collected, and it may issue many millions of dollars of certificates, possibly, under what is known as the Mueller Law, payable only out of the receipts of the traction railways if it takes them over.

If it can take money for the miscellaneous receipts to aid local improvement bonds, payable only out of assessments

levied for local improvements, no reason is perceived why it cannot do the same thing to aid the certificates for indebtedness in both the cases above mentioned. A precedent now made in a small matter might have serious consequences hereafter.

The same arguments used to sustain this scheme, to-wit: that the city is benefited, are always found in attempts to sustain illegal appropriations, or the exercise of powers not expressly conferred upon municipalities. The same argument that the city is benefited has been used in attempts to sustain appropriations for the entertainment of official visitors, appropriations to aid in the erection of manufactories, the building of railroads into a city or village, to borrow money, to contest the removal of a county seat, etc.

The authorities are clear as to the effect that the welfare and the interest of the whole city must be the primary object of the alleged corporate purpose, and it is not sufficient that incidental benefit may accrue from the undertaking or expenditure. Equity will not sustain attempts to indirectly do what is expressly or impliedly prohibited.

In the 100th Wis., *Rice v. Milwaukee*, page 522, it was held that where, for the purpose of paying overdrafts on their funds, money was drawn from a fund over which the city has no control, except to pay regular demands upon it, the amount of the overdrafts should be considered a debt in determining the amount that the city could become indebted.

To show that the courts have always maintained with jealous vigilance the restraints and limitations imposed by law upon the exercise of powers of municipal corporations, reference may be made to the case in the 31st Maryland, page 375, *Baltimore v. Gill*.

There the city council endeavored to raise a large sum of money by pledging some stock that the city owned, with the proviso that the city should not be liable in any way for the amount of money raised; that the only security therefor should be the stock pledged. The court held that

the raising of the money was, in fact, a borrowing of it and a becoming indebted by the corporation.

In a case in the 107th Iowa, 90, an attempt was also made to evade indirectly the limitation in the constitution against indebtedness, and it was there held that the city could not do indirectly what it had no power to do directly.

The only safety of the public lies in a strict construction of the powers granted to municipalities, and I know of no case where there is a special designation of corporate purposes to be exercised, the corporation has been permitted—under the general power to appropriate money for corporate purposes—to exceed the limitations imposed by the charter, upon the pleas, as in this case, that there was an incidental benefit to be derived by the city at large.

The motion for injunction must be granted.

After the conclusion of the argument upon said motion for said preliminary injunction, it was stipulated in open court by counsel for the respective parties, that in order to speed the final determination of the cause and to lessen the cost of litigation, and because no other relief was prayed in the bill of complaint upon the issuance of said injunction, and no other issues were made or presented by the pleadings than those which had been considered upon the hearing of said motion, that the hearing upon said motion be deemed and taken as a final hearing of the cause, and that the allegations of said bill of complaint and of said affidavit of Sydney Stein should be taken and considered as evidence duly introduced upon a final hearing of the cause, and that the answer of the said defendants and the amendment to said answer should be further taken and considered as evidence duly heard upon the final hearing of said cause.

And thereupon, the said cause coming on for final hearing upon said bill, answer, amendment to answer and the replication filed herein, each of the foregoing documents hereinbefore set forth were again offered and read in evidence upon such final hearing, and the foregoing was all the evidence introduced, offered or received on the hearing of the said motion and on the hearing of the said cause."

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Thereupon the court found that it had jurisdiction of the subject matter of the cause and of the parties by their voluntary appearance herein; and that the equities in this cause are with the complainant; and ordered that the preliminary injunction issued herein "be and the same hereby is made permanent"; and that the complainant have and recover from the defendants his costs.

From this decree the defendants perfected an appeal to this court.

The foregoing opinion so clearly expresses our judgment in the premises that we adopt it as the opinion of this court.

The decree of the Circuit Court is affirmed.

Affirmed.

Chicago Telephone Company v. Mary Schulz.

Gen. No. 12,040.

1. *RES IPSA LOQUITUR*—when doctrine of, does not apply. The doctrine of *res ipsa loquitur* has no application as between master and servant.

2. *SERVANT*—when justified in continuing in hazardous employment. A servant is justified in continuing in hazardous employment for a reasonable time where the master has promised to repair the defect which occasions the hazard, unless the danger of so doing is so imminent that a person of ordinary prudence would not incur it.

3. *INSTRUCTION*—when estoppel to complain of, arises. A party cannot complain of the modification of an instruction where the substance of such modification is contained in an instruction given at his request.

4. *RELEASE*—within what time minor may repudiate, upon attaining majority. A minor upon attaining majority is entitled to the period within which an action may be instituted, to repudiate a release given during minority discharging defendant from liability on account of the cause of action.

Action on the case for personal injuries. Appeal from the Superior Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the October term, 1904. Reversed and remanded. Opinion filed July 17, 1905.

Statement by the Court. This is an appeal from a judgment rendered in favor of appellee and against appellant, in an action in case for negligence, in the sum of \$8,500. The jury assessed appellee's damages at the sum of \$15,000, but, on motion for new trial, appellee remitted \$6,500. Hereafter appellee will be referred to as plaintiff and appellant as defendant.

The suit was commenced June 20, 1901. December 9, 1902, the cause was called for trial and a jury empaneled, but on December 11, 1902, plaintiff withdrew a juror and thereupon the jury was discharged and the cause continued. March 25, 1904, the cause again came on for trial and a jury was empaneled, which jury, April 1, 1904, rendered a verdict for \$15,000, as above stated.

The defendant's counsel, in their printed argument, set forth, substantially correctly, the counts on which the cause was tried, as follows:

"Second Count. Plaintiff on April 23, 1899, was a minor aged seventeen years; defendant was operating an electric telephone system in Chicago in one of its central offices at 151 East Twenty-second street; plaintiff was in defendant's employ as an operator in said office, and it was her duty to answer calls and operate the switchboard so as to establish a circuit between parties calling and being called, and to enable her to receive messages a receiver was attached to her head and left ear. The defendant knew, or with reasonable care could have known, that if an unusually large current of electricity were permitted to get upon the line or wire connected with said receiver, it would produce great bodily injury, possibly death, and it was defendant's duty to so skillfully care for and properly manage and operate its appliances as to prevent the entering of an extra large quantity or current of electricity on the wires and switchboard and into the receiver attached to plaintiff's ear and head. That defendant, not regarding its duty, etc., so wrongfully, negligently and carelessly managed and operated its wires, switchboards, receivers, transmitters, machin-

ery and other electrical appliances of its telephone system as aforesaid as to, by the negligent and unskillful operation of the same, as aforesaid, allow and permit an unusually large and powerful current of electricity to get into and upon the wires, switchboard, * * * etc., and by means thereof, while the plaintiff was employed at her duty, and while she was in the exercise of all due care and caution for her own safety and without warning or notice to her in any way, an unusually large current of electricity came in contact with the plaintiff from said receiver attached to the head and ear of the plaintiff, whereby she was greatly hurt and burned and rendered unconscious and sustained great bodily injury and pain, and became permanently deaf in the left ear, and suffered and still suffers and will continue to suffer nervous spasms; that she has become deformed and emaciated and sustained a nervous shock and has become permanently disabled, etc.

Third Count. Relations of the parties set forth as in previous count. That it was defendant's duty to properly, skillfully and carefully insulate and guard its said receiver attached to plaintiff's head and ear, wires, switchboards, transmitters, telephone and electrical appliances and other appurtenances thereof, which plaintiff was obliged to come in contact with while performing her duty as an operator, so as to prevent or avoid the introduction of an extra large, strong and powerful current of electricity to enter said receiver and other electrical appliances in and about where the plaintiff was at work. Yet the defendant, etc., kept said receiver so attached to the plaintiff's head and ear, as aforesaid, and other appliances herein mentioned, negligently, wrongfully, carelessly and improperly insulated and improperly guarded from foreign currents and unusually strong and powerful currents of electricity, by reason whereof, while the plaintiff was at work in the exercise of due care, etc., an extra large and powerful current of electricity came in contact with and into and onto the said receiver so attached to the plaintiff's head and ear, as afore-

said, and against the plaintiff, by reason whereof, etc., as in previous count.

Amended Second Additional Count. Relations of the parties as in previous counts. That it was defendant's duty to so construct, operate, control, insulate and use its wires, switchboards, etc., that they would be reasonably safe to the plaintiff, and whenever its wires, switchboards, etc., became worn and out of repair or improperly insulated and improperly guarded against foreign currents of electricity, to repair the same. Yet defendant, although notified that said electrical appliances and apparatus of said telephone system were out of repair and unsafe, and although said defendant then and there promised to repair the same and thereby induced the plaintiff to continue in her said employment as such operator, relying upon such promise, yet the defendant negligently and carelessly permitted said telephone system, appliances and apparatus to be and remain in an unsafe and dangerous condition as aforesaid, in that the same had become worn and out of repair and improperly insulated and improperly guarded against foreign currents of electricity, by means whereof the plaintiff, while exercising due care, etc., an unusually large and powerful current of electricity came in contact with the plaintiff from said receiver attached to the head and ear of the plaintiff, whereby, etc., as in previous counts.

Amended Refiled First Original Count. Relations of parties as in previous counts. That it was defendant's duty to so construct, operate, control and use its machinery, etc., that they would be reasonably safe to the plaintiff; yet the defendant wholly disregarded its duty as aforesaid, and in a negligent and careless manner, and while the plaintiff was using all due care and diligence for her own safety, permitted and negligently caused an excessive, unusual and extraordinarily large voltage or current of electricity to pass through and over the wires and into the receiver attached to the plaintiff's head and ear and against the plaintiff, thereby, etc., as in previous counts."

The defendant pleaded the general issue to the whole

declaration, and the two years Statute of Limitations to the second and third counts, to which the plaintiff replied that she commenced suit within two years after she attained her majority. No question is raised as to the statute by defendant's counsel. Twenty-one witnesses were examined, and the evidence is quite voluminous. The plaintiff commenced work with the defendant, as a switchboard operator, at its office called South Exchange, in Chicago, the first part of August, 1898, and worked for defendant as a switchboard operator, until April 23, 1899, when she claims to have received the injury for which this suit was brought. She claims that about three o'clock in the afternoon of April 23, while attempting to answer a telephone call, she received an electric shock, which she attributes to the defendant's negligence as charged in the declaration. The evidence tends to prove that she became unconscious at that time and had to be carried into another room, where she was attended by a physician called by the defendant, and that, in about twenty minutes, she recovered consciousness, and went home from the office that evening, walking to and from the street cars on her way home, as usual. She returned to defendant's office in about a week or ten days, when she resumed her work as a switchboard operator, and continued in defendant's employ as such until April 15, 1901, almost two years after the time of the alleged injury.

Plaintiff also produced evidence tending to prove that prior to April 23, 1899, her health was good, and that since that date she has suffered from headache, earache and fainting spells, and has lost the hearing of her left ear, to which the telephone receiver had been attached by a device not necessary to be described, prior to and at the time of the alleged injury.

The day of the alleged injury was Sunday, and plaintiff testified that she reported to the chief operator, by local wire in the room in which she was working, on the Tuesday next preceding April 23, 1899, and again on the Friday or Saturday next preceding that date, "Position was rung down and cannot get anybody on it." She says that

the drop was down, and it was her duty to report as she did. Also, that on the morning of April 23 the drop was down, and Mr. Francis, the manager, came along and asked her why she did not answer the call, and she said there was something wrong with the wire, that she couldn't get anybody on it, and he said he would have it attended to and looked after. The chief operator testified that she received no report as testified to by plaintiff, and Francis testified that he had no recollection of such conversation as plaintiff testified to. Plaintiff further testified that she got calls all right on the line from that time till about three o'clock in the afternoon, when the accident occurred.

By "drop" is meant a small metal shutter working on a hinge at the bottom, and which is held in place at the top by a latch which is electrically released when a signal is given, and which should spring back, or be restored to its place, by means of apparatus arranged for that purpose. The uncontradicted evidence for the defendant is, that the failure of the drop to restore indicates something out of proper adjustment in the drop or in the restoring apparatus; also that there is no relation between the line current and the drop restoring mechanism, and that the fact of the drop not restoring indicates nothing as to there being an extraordinary current on the line. The uncontradicted evidence for defendant is that within about ten minutes after the plaintiff was carried from the room, the long distance chief operator, and also the chief operator in the room where the plaintiff worked, tested the line and found it perfectly clear; that they communicated with the long distance telephone company over the line at which plaintiff had been operating; that they talked with the long distance operator over the line, and that, on making the test, the apparatus of the switchboard showed no marks of burning, as defendant's witnesses testify it must have shown had an unusually large current passed over the wire. Hanson, the repairman, testified that about fifteen minutes after the accident he tested the line and found everything in perfect order. The only testimony as to the construction of the

telephone apparatus and its equipments, and the safety devices used for the protection of the operators, is that of the defendant's witnesses, and is, in substance, that all the apparatus was purchased from the Western Electric Company, which is the largest manufacturer of such apparatus in the country, and of the highest reputation, and was of the very latest type, and the best known to the art, in its method of construction and for protection to the operator, and that, at the time of the alleged accident and at the time of the trial, there was no better system known to the telephone art.

Sherwood J. Larned, superintendent of the defendant, called by plaintiff, testified that he had supervision of the office at the time of the alleged accident, and was familiar with the electrical appliances in use there. Recalled by the defendant, he testified: "The whole system that I have described, and as I know it from my own acquaintance with it at that time, was the most perfect that was known at that time for the protection of the operator at the switchboard in an exchange. It would have been impossible with the circumstances as they were, and as I have described them, for an operator at the switchboard, seated in her chair and operating in the usual way, to get an electrical shock in the ear through the receiver, either from the regular current or from a foreign or extraordinary current."

Miss Brogan, the chief operator in the room where plaintiff worked, and who was the supervisor of the other operators in that room, testified that she received a call, by wire in the room, from the plaintiff, asking, "May I be relieved?" that she immediately rose from her desk to ask another operator to take plaintiff's place, and in a couple of minutes after she received the call for relief, she saw the plaintiff's head fall back to the left side, and went to her and, with the assistance of Miss Barton, helped plaintiff from the room. Miss Ryan, an operator who sat about 18 inches to the right of plaintiff, saw her becoming unconscious. There is evidence tending to prove that plaintiff became unconscious twice before the alleged accident, while in defendant's employ. Miss Brown testified that part of

the time plaintiff was working for defendant she worked in the same office with her, but in April, 1899, she was working in another of defendant's offices; that one morning as plaintiff entered the office, she had a fainting spell and was carried into another room and laid on a couch, and did not come to for some time, and that, at another time, she had a fainting spell at the switchboard, that she keeled over while operating at the board and was carried out by the manager and Mr. Hanson, the repair man. Francis, the manager, and Hanson, the repair man, both corroborate Miss Brown as to plaintiff having had, prior to the time of the alleged accident, a fainting spell at the switchboard, and to having carried her out of the room. Hanson testified that operators are often taken sick or have fainting spells at the board. Miss Brown is the only witness to the first fainting spell above mentioned. The plaintiff, in rebuttal, denied that she ever had a fainting spell at the board, as described by Miss Brown, before the time of the alleged accident; but, as above shown, there are three witnesses against her.

During the time plaintiff worked for defendant after the alleged injury, there is no evidence that she did not work as well as formerly and as many hours per day, or that she lost any time.

HOLT, WHEELER & SIDLEY, for appellant.

BOWLES & BOWLES and J. L. BAILY, for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

The plaintiff's counsel argue that the evidence shows that the plaintiff received an electric shock, and that the jury were warranted in so finding. In view of the conclusion we have reached, after a very careful consideration of the evidence and the arguments of counsel, we do not find it necessary, nor do we deem it expedient to pass on this question. It was incumbent on the plaintiff, on the hypothesis that she received an electric shock, to prove that the shock was occasioned by the defendant's negligence. Negligence

cannot be inferred from the fact of the shock. Plaintiff was in the defendant's employ, and the doctrine *res ipsa loquitur* has no application as between master and servant. *Omaha Packing Company v. Murray*, 112 Ill. App., 233, 238-9, and cases there cited.

The trial court, by instructions 12 and 15, instructed the jury, in effect, that if they believed from the evidence that the plaintiff received an electric shock, as alleged, that fact was not evidence of negligence on the part of the defendant, and that it was incumbent on the plaintiff to prove negligence of the defendant by a preponderance of the evidence. Yet, while counsel for appellee, in their printed argument, refer to these instructions without dissent, and disclaim reliance on the doctrine, they cite cases from other jurisdictions apparently in support of it. Counsel for plaintiff also rely on what they call a promise to repair. The evidence referred to in the preceding statement shows that all the plaintiff complained of was that the drop did not restore; that there was something wrong with the line, as she had gone in on it and could not get anybody, and that Mr. Francis, the manager, said he would have it attended to. But the evidence also shows, without contradiction, that the mechanism which operated the drop had no relation to the line current. Miss Kate Ryan, who sat about 18 inches from plaintiff, to her right, at the same switchboard, was called by plaintiff and testified, in substance, that she, the witness, had occasion to use the line sometimes two or three calls to the minute, and that at the time of the alleged accident, and immediately prior thereto, the drop acted as it always did, that it came down as it always did ever since witness had been operating where she then was. The evidence shows that there was no danger to be anticipated from the fact that the drop did not restore, and that the apparatus and line, almost immediately after the alleged accident, was found to be in perfect order. Had the line been tested just prior to the alleged accident, it is apparent from the evidence that the result would have been the same. Plaintiff, herself, testified that from the time

she spoke to Mr. Francis, in the morning, until three o'clock in the afternoon, she had no trouble with the line. Excluding the doctrine *res ipsa loquitur* as being inapplicable, we find no sufficient evidence of negligence on the part of defendant, as charged in the declaration. As the cause must be remanded for another trial, we will next consider certain alleged errors of the trial court.

We are of opinion that defendant's instruction 6, to the effect that the evidence is insufficient to support the amended second additional count of the declaration, should have been given. We find no error in the refusal of defendant's 25th instruction. Assuming that the wire was in a dangerous condition (which the instruction necessarily assumes), the plaintiff's evidence tends to prove a promise to remedy any defect in it, and this would justify the plaintiff in continuing to use it for a reasonable time in which to repair it, unless the danger of using it was so imminent that a person of ordinary prudence would not have incurred it. *Offutt v. World's Columbian Exposition*, 175 Ill., 472, 479. The instruction, both as asked and as modified and given, omits this element. For the same reason, we think the refusal of defendant's instruction 27 was not error. We think the instruction as modified and given should not have been given; but the modification of which plaintiff's counsel complain is substantially the same as language contained in plaintiff's 22nd instruction, and, therefore, plaintiff is not in a position to complain of it.

The plaintiff, May 2, 1899, when she was seventeen years and between two and three months of age, executed a release to the defendant. June 17, 1901, when she was nineteen years and four months of age, she, by letter to the defendant, disaffirmed the release. The court refused an instruction asked by defendant, to the effect that plaintiff did not repudiate the release within a reasonable time after attaining her majority. We are of opinion that the refusal of the instruction was proper. *The Supreme Court*, in *Cole v. Pennoyer*, 14 Ill., 158; *Blankenship v. Stout*, 25 id. 116; *Rucker v. Dooley*, 49 ib., 377, and *Keil v.*

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Healey, 84 ib., 104, have adopted the rule that an infant may avoid a deed of conveyance of land, made during minority, after attaining majority, within the time limited by the Statute of Limitations for bringing on action. We perceive no good reason why this rule should not apply equally to purely personal actions. The limitation in such cases as this is two years. Hurd's Statutes, 1903, p. 1207, sec. 14. The plaintiff repudiated the release within two years after she attained her majority, after which she brought suit June 20, 1901, also within the two years.

We think it unnecessary to consider in this opinion whether the damages are excessive.

The judgment will be reversed and the cause remanded.

Reversed and remanded.

Anthony W. Stanmeyer v. Flora Rosenwald.

Gen. No. 12,058.

1. **CERTIFICATE OF EVIDENCE—when must be signed.** A certificate of evidence must be signed by the chancellor at the decree term or within such time as the court has by order retained jurisdiction for that purpose.

2. **CERTIFICATE OF EVIDENCE—when order granting appeal does not retain jurisdiction for purpose of signing, after lapse of decree term.** An order as follows: "Appeal prayed and allowed on filing bond in the sum of \$400 within twenty days, and certificate of evidence in — days," does not retain jurisdiction in the court for the purpose of signing a certificate of evidence after the lapse of the decree term.

3. **CERTIFICATE OF EVIDENCE—when time limit fixed by order for presentation of, expires.** Where an order fixing the time for the presentation of the certificate of evidence limits the same to a specified day, all of that day is allowed for that purpose.

4. **CERTIFICATE OF EVIDENCE—effect of striking from transcript.** The effect of striking a certificate of evidence from the transcript of the record does not necessarily result in the affirmance of the decree appealed from.

5. **RECEIVER—when disbursements for taxes, etc., properly disallowed.** Where the findings of the decree appealed from justify

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the disallowance of disbursements made for taxes, etc., such disallowance, however hard it may seem, is proper where the evidence upon which such findings are predicated is not preserved by certificate of evidence properly in the transcript.

Foreclosure proceeding. Appeal from the Superior Court of Cook County; the Hon. MARCUS KAVANAGH, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed July 17, 1905.

Statement by the Court. Pankratz Weidner filed a bill in chancery in the Superior Court of Cook county against Katherine Martin and various other defendants, in March, 1897, to foreclose a trust deed made by Katherine Martin to secure an indebtedness of \$2,400. Among the defendants was Louis J. Blum, who was the holder of a sheriff's certificate of sale of the premises described in the trust deed. Said certificate was based on a judgment against Katherine Martin, the owner, and mortgagor. On this sale the time for redemption was about to expire. When Blum afterward answered the bill that time had expired and a sheriff's deed was issuable to the holder of the certificate. Flora Rosenwald, the appellee, then Flora Blum, became, by assignment from Louis J. Blum, the holder of said certificate, and April 14, 1897, a sheriff's deed issued to her of the said premises, which were land and a building thereon at 1963 West Lake street in Chicago.

By an order in the foreclosure cause entered, as it recites, on due notice to all parties in interest, Anthony W. Stanmeyer, the appellant here, was appointed receiver of said premises May 6, 1897, the order providing that he should "take charge of said premises until the further order of the court and rent the same and collect the rents and profits accruing from said premises," and that he had leave "out of any moneys received by him as such receiver," to "pay the taxes and assessments on said premises, procure necessary insurance, and make such repairs thereon as may from time to time be necessary, and do all other things to preserve said property as may be necessary and proper," and that he should "report to the court when directed his acts

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and doings as such receiver and the moneys received and paid by him," and that he had leave "to apply to the court from time to time for such orders or directions as may be necessary." Said receiver took possession of said premises immediately and continued in possession until April 5, 1899, and collected as rent for the entire term of his possession \$295.

January 4, 1898, under a decree of the Superior Court rendered in the foreclosure suit, the premises were, by a master in chancery, sold to the complainant in said suit, Pankratz Weidner, for the full amount of the indebtedness due to the complainant under the said decree of sale, \$3,722. April 5, 1899, a master's deed of said premises was executed and delivered to Pankratz Weidner, and on the same day the receiver, Stanmeyer, delivered to said Weidner possession of the premises. May 24, 1904, the receiver was ordered to file his final account and report in the cause, and filed them June 10, 1904. The account showed receipts of \$295 and disbursements of \$201.58 for repairs (of which amount \$122.71 was expended before January 4, 1898, and the rest afterwards), of \$18.51 for water taxes from November, 1897, to May, 1899, \$40 for receiver's fees, and \$20 for his solicitor's services, aggregating \$280.09, and leaving as a balance on hand with the receiver \$14.91. To the report and account of the receiver Flora Rosenwald filed objections, alleging that the various items of expenditure for which the receiver asked credit were made without authority and in the interest of the complainant, Pankratz Weidner, and were not made for any indebtedness which was a charge upon the interest of the objector during the time allowed for redemption from said sale. She asked in said objections so filed that the court ascertain and decree the full amount of receipts of rents from said premises and order that the same be paid over to her.

July 18, 1904, the court entered an order finding certain of the before mentioned facts, and that from and after April 14, 1897, Flora Rosenwald became and was entitled

to all the rents, profits and issues from said premises collected by said receiver during the time for redemption, and that she was at the time of the entry of the order entitled to the sum of \$295. The order concludes: "The court further finds from said receiver's report and from the evidence that said Anthony W. Stanmeyer, as receiver, expended the whole of said sum of Two Hundred and Ninety-five Dollars upon the above described premises at the instance and by the direction of the said complainant, Pankratz Weidner, and that said premises have been improved and benefited to the extent of said expenditure. It is, therefore, ordered, adjudged and decreed that the exceptions filed herein by said Flora Rosenwald to said receiver's report be and the same are hereby sustained, and it is ordered that said Flora Rosenwald have and recover of and from Anthony W. Stanmeyer the sum of Two Hundred and Ninety-five Dollars and have execution therefor."

From this order Stanmeyer prayed an appeal to this court, and has assigned as error the action of the court in not allowing him the credits claimed in his account, in sustaining the objections to the account, and in entering judgment against him.

The transcript of the record filed in this court is made up on a praecipe appearing therein, and does not therefore purport to be a complete transcript of the record in the cause. - A certificate of evidence signed by the trial judge is included in the transcript, which certifies only that it was agreed between counsel for appellant and appellee as follows: That said Flora Rosenwald was the owner of the premises described in the bill of complaint between January 4, 1898, and April 5, 1899; that Flora Rosenwald was made defendant to the bill by the name of Flora Blum; that Stanmeyer took possession of the premises on May 6, 1897, and continued in possession thereof until April 5, 1899; that on this last date a master's deed conveyed the premises to Pankratz Weidner and the receiver surrendered the possession to him; that said receiver received from rent of said premises during the term of his possession \$295,

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and expended the same as shown by his report, and that no demand for possession of said premises was ever made upon said receiver by said Flora Rosenwald during the time said premises were in possession of the receiver.

GEORGE W. HESS, for appellant.

JOHN C. WILSON and WILLIAM SLACK, for appellee;
LOUIS J. BLUM, of counsel.

MR. JUSTICE BROWN delivered the opinion of the court.

There is a motion of appellee in this cause reserved to the hearing, "to strike from the record the certificate of evidence filed in the above cause, and to affirm the decree entered on July 18, 1904." Suggestions in support of this motion show that the position is taken by counsel for appellee that the one action of the court must necessarily follow the other. This is not so. The certificate of evidence must be stricken from the transcript, but there still will remain the appeal to dispose of, on that transcript which remains. The necessity for acceding to the motion "to strike the certificate of evidence from the transcript of the record," and to disregard it in this cause entirely, is that the decree appealed from was entered at the July term, 1904, of the Superior Court, and no certificate of evidence was signed during that term, nor was there a rule entered having the effect to carry over the power of the court to sign such a certificate until the next term. There was an undoubted intention to do so, but through inadvertence it was ineffective. There is certainly nothing in the order for allowance of the appeal, which reads thus: "Appeal prayed and allowed on filing bond in the sum of Four Hundred (\$400) Dollars within twenty (20) days, and certificate of evidence in _____ days," from which we can read into the blank, "twenty" or any other number. Had the certificate of evidence been presented during the July term, the court would have had power to sign it and make it a part of the record, but it had no such power after that term, because on entering the decree it had reserved none. If the

court had possessed the power to act on the certificate of evidence after the July term, we should have had, however, no hesitation in deciding that an extension of time in which to file it to September 20, gave to appellant all of the 20th of September for that purpose. *Burhans v. The Village of Norwood Park*, 138 Ill., 147, cited by appellee, has no proper application here.

Counsel for appellant, however, declare that they consider the certificate of evidence of little importance, and that they regard the findings of fact in the decree insufficient to justify it.

It undoubtedly seems hard that a receiver appointed by the court, with a general leave given him out of such moneys as he receives to pay taxes and assessments and make such repairs as may be necessary and proper, should find his payments for water taxes and for repairs disallowed, and be compelled to account for money which he had thus expended, but we do not see how we can avoid the conclusion that a *prima facie* justification for the ordering portion of the decree of July 18, 1904, is contained in its findings of fact. Those findings are in effect that appellee was, from and after April 14, 1897, the owner, subject to the mortgage incumbrance foreclosed in the cause, of the premises in question and entitled to the rights of such owner; that on January 4, 1898, the premises were sold to Weidner under the foreclosure decree for enough to wipe out the mortgage and decree indebtedness altogether; that although the appellee thereupon became entitled to all the rents, profits and issues collected by the receiver for the succeeding fifteen months, yet the receiver expended the whole of this sum, being \$295, upon the premises at the instance and by the direction of the complainant Weidner, and that the premises have been improved and benefited to the extent of the expenditure.

These findings seem to us, in the absence of any evidence whatever otherwise preserved in the record, sufficient to sustain the decree. The complainant took the property when he bought on January 4, 1898, *cum onere*, and had

no right to possession of it or to income or issues from it, until the period of redemption had expired. This is the law which the appellant, like every other citizen, was presumed to know. Yet the court finds that he expended all the money in his hands, rents and income belonging to the appellee, on the improvement of the premises, which, in case they were not redeemed, he knew were shortly to pass from the ownership of appellee and the possession of himself, to the ownership and possession of Weidner, and that he did this at the instance and by the direction of said Weidner.

It is not necessary for us to decide what the court ought to have done concerning these funds, or concerning the receiver's report and account, on the hypothesis that there was evidence in the cause that the repairs were necessary to preserve said property or to keep it in a tenantable condition, for there is no such evidence in the record which we can consider. The receiver's report cannot be taken by itself as sufficient evidence of it, and "the certificate of evidence" which contains the stipulation that he expended the money "as shown in his report," is not properly before us. The *prima facie* right of the appellee to have the funds decreed to her, appearing by the findings of the decree, and there being no evidence to the contrary preserved, and no certificate even that there was not evidence overthrowing the sworn statements of the receiver's report and account as to the disposition of the money which he received, we do not see what justification there would be for our disturbing the decree, even if we should hold with the appellant's counsel that it is "unjust and inequitable to claim the benefits of the receiver's labors * * * and dispute the outlays made by him * * * authorized by the order of his appointment, and without which the income could not have been secured." For whether the outlays were thus authorized, or were such that without them the income could not have been collected, does not, in the present state of the record, appear. We cannot indulge in a presumption even that they were, and for anything that appears,

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the evidence in the cause may have shown that they were not.

It is to be remembered in considering the alleged hardship of the decree against the appellant, that he had at any time the right and opportunity "to apply to the court for orders and directions," and might in each case of desired repair or improvement have obtained specific orders and directions (which would undoubtedly have conformed to the law), rather than have satisfied himself with "the directions of the complainant," and that under the doctrine of *Haigh v. Carroll*, 209 Ill., 576, if he has improperly paid out money for the benefit of Weidner, and has been obliged to refund it, he may have recourse against Weidner for the same.

The order of the Superior Court appealed from is affirmed. *Affirmed.*

Herbert N. Rose v. Peter P. Smith, et al.

Gen. No. 12,408.

1. INJUNCTION—*what essential to granting of, without notice.* In order that an injunction may be properly granted without notice, the complainant must show such facts by sworn statement, either in the bill or accompanying affidavits, or both, as will enable the court to draw the conclusion that his rights will be unduly prejudiced by the giving of notice; a mere statement of conclusions will not suffice.

Appeal from interlocutory order granting injunction. Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the March term, 1905. Reversed. Opinion filed July 17, 1905.

ROSSELL B. MASON, for appellant.

PHILETUS SMITH, for appellees.

MR. JUSTICE BROWN delivered the opinion of the court.

We are obliged with reluctance to reverse the order for an interlocutory injunction in this case.

Without entering into the merits of the cause, it seems to us that there is on the face of the bill, which is for an accounting as well as for a perpetual injunction, a case for an injunction *pendente lite* which shall preserve the *status quo*, to the injury of neither party, until the conclusion of the litigation in the Superior Court. Certainly much greater damage would be done to complainants by the summary action threatened, if in the end they should be finally adjudged meritorious in their contentions, than would in the other contingency result to the appellees from the existence of the injunction. The alleged rights of the appellees are not such as they can show at law in an appeal from the detainer judgment of the justice, and we do not think therefore that the possibility of such an appeal forbade this injunction order. Nor do we think there is any merit in the contention that this injunction could not in the discretion of the chancellor issue without bond. The judgment enjoined is not such a judgment as falls within section 8 of the Injunction Act.

But there is no escape from the proposition that this injunction was erroneously granted. It was granted without notice and without any such showing as is peremptorily required by the statute, that the rights of the complainant would be unduly prejudiced if it were not so issued. Sec. 3, chapter 69 of the Revised Statutes of Illinois. Either in the bill or in the affidavits accompanying it, or both, allegations of facts must appear under oath, which lead the court to the reasonable conclusion that the rights of the complainant would be unduly prejudiced if notice were given, or the order granting the injunction will be erroneous. *Becker v. Defebaugh*, 66 Ill. App., 504, and cases therein cited; *Board of Trade v. Riordan*, 94 Ill. App., 298. Neither in this bill nor in the affidavit of verification, which alone accompanies it, are there any such allegations.

The argument of appellees' counsel that the bill was filed so late that it would have unduly prejudiced the rights of complainants to give notice, simply because notice could

not have been given before some injurious action might have been taken by appellant, is not satisfactory. Nothing appears to show that the bill could not have been prepared and filed long enough beforehand to have made ample notice possible, nor indeed that notice might not have been given when the bill was filed and a hearing had before anything could have been done under an execution from the justice in the detainer case. It certainly will not do to say that the variety of reasons for not giving notice or preparing the bill sooner, which are stated by counsel in his brief and do not appear in the record, are reasonable presumptions for us to entertain to sustain the injunction. Such an argument would compel us to imagine a state of facts not appearing of record, to sustain every injunction granted without notice. It would nullify the statute completely.

Reversed.

James E. Pepper Distributing Company, et al., v. Angus McLeod, et al.

Gen. No. 12,428.

1. INJUNCTION—*when order for, obtained without notice, erroneous.* An injunction granted without notice upon a bill not positively verified, is erroneous.

2. INJUNCTION—*what essential to granting of, without notice.* In order that an injunction may be properly granted without notice, the complainant must show such facts by sworn statement, either in the bill or accompanying affidavits, or both, as will enable the court to draw the conclusion that his rights will be unduly prejudiced by the giving of notice; a mere statement of conclusions will not suffice.

Appeal from interlocutory order granting injunction. Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the March term, 1905. Reversed. Opinion filed July 17, 1905.

ZEISLER, FARSON & FRIEDMAN, for appellants.

CYRUS HEREN and F. A. ROCKHOLD, for appellees.

MR. JUSTICE BROWN delivered the opinion of the court.

This appeal from an interlocutory injunction of the Circuit Court is principally based on the insufficiency of the affidavits filed with the bill to sustain the order for the injunction, which was obtained without notice.

It is also argued by appellants that the injunction is too broad, and that a court of equity is without jurisdiction in the subject-matter.

With these last contentions we do not agree. There is enough on the face of the bill to warrant an injunction *pendente lite* to preserve the *status quo* if the allegations were properly verified. But they are not so verified, and the order for this injunction, obtained without notice, must be reversed.

Whatever might be properly urged in relation to the reasonable construction of the language in the affidavits involved here, if it were a matter of first impression, it has become a closed question in this court by a long line of decisions; that such an affidavit as is appended to the bill as a verification, does not assert the truth of any allegation therein positively. *Neil v. Oldach*, 86 Ill. App., 354, and cases therein cited.

Had the affidavit, as in *Parish, et al. v. Vance et al.*, 110 Ill. App. 50, positively asserted the truth of all the allegations of the bill, except those "therein *stated to be* upon information and belief," and there had been none "therein so stated," the argument of appellees would be valid, but the affidavit under discussion says that "the allegations are true * * * except such as *are* alleged on information and belief," etc. This leaves it, so this court has often held, entirely indefinite as to which allegations are alleged on information and belief, and consequently which are and which are not positively verified. Without further verification of the bill than this affidavit, therefore, the injunction should have been refused, even if the application had not been *ex parte* and without notice. For an interlocutory injunction is in any case seldom granted without adequate verification of the bill (*High on Injunctions*, sec. 1567;

Hawkins v. Hunt, 14 Ill., 42; Board of Trade v. Riordan, 94 Ill., 298), and in this case we should have felt obliged to have held it fatally erroneous.

It is, moreover, in direct violation of the statute, and therefore necessarily erroneous to grant without notice an injunction unless "it shall appear from the bill or affidavit accompanying the same, that the rights of the complainant will be unduly prejudiced" if the injunction is not so issued without notice. This has been often held by this court to mean that to avoid the necessity of notice the complainant must show such facts by sworn statement, either in the bill or accompanying affidavits, or both, as will enable the court to draw the conclusion that the rights of the complainant will be unduly prejudiced by giving it. Becker v. Defebaugh, 66 Ill. App., 504, and cases therein cited. The mere statement of a conclusion by the affiant that the rights of the complainant will be so unduly prejudiced is not sufficient. To this proposition this court is committed. Board of Trade et al v. Riordan, 94 Ill. App., 298.

In the case at bar the affidavit especially prepared to secure the injunction without notice contains no allegations of facts of any kind, and therefore we are referred entirely to the bill for them. But as they appear in the bill they are, as before pointed out, unsworn in the sense in which there must be verification to justify an injunction. It is not, therefore, necessary for us to decide whether they are sufficient were they properly verified to warrant the action of the court below. But it may be noted that any conclusion that the rights of complainant would be prejudiced by notice must be a purely speculative inference if drawn from any facts thus alleged in the bill.

Reversed.

Independent Credit Co. v. South Chl. City Ry. Co.

**Independent Credit Company v. South Chicago City
Railway Company.****Gen. No. 12,405.**

1. **WAGES**—*right of assignee of, to maintain action for.* The assignee of wages earned and to be earned has the right to maintain for its use an action against the debtor in the name of the creditor.

2. **WAGES**—*injunction does not lie to restrain assignee of, to sue for.* Injunction does not lie to restrain the assignee of wages earned and to be earned from suing the employer in the name of the employee from time to time as the wages accrue.

3. **TENDER**—*does not extinguish debt.* The tender of an amount due or claimed to be due, where not accepted, does not extinguish the obligation nor affect the right of the creditor to maintain an action thereon.

4. **CAUSE OF ACTION**—*creditor cannot split.* A creditor cannot split an entire cause of action and maintain several suits thereon.

Injunctional proceeding. Appeal from the Superior Court of Cook County; the Hon. MARCUS KAVANAGH, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1905. Reversed. Opinion filed October 6, 1905.

Statement by the Court. The bill in this case was filed by South Chicago City Railway Company against Independent Credit Company and Edward L. Shover. It alleges the recovery by Shover of a judgment against complainant for the use of said Credit Company for \$40, upon an assignment by Shover to said Credit Company of his earned and unearned wages from said Railway Company as security for an usurious loan of money from the Credit Company to Shover; that certain payments had been made by Shover to said Credit Company, leaving the balance due said Company \$15.50; that prior to the bringing of said bill Shover tendered to said Credit Company \$18.50, the full amount remaining due upon said loan with legal interest thereon, which tender was rejected, and that Shover is still willing and ready to pay in extinction of said loan the balance remaining unpaid with legal interest thereon.

The prayer of the bill was that said judgment be set aside and vacated; that the Credit Company and Shover be enjoined from enforcing said judgment and from bringing

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other suits for wages against complainant. Upon the filing of the bill and certain affidavits in support thereof an order for an injunction was made, and the Credit Company appealed.

EDWARD H. MORRIS, for appellant.

JAMES W. DUNCAN and MORGAN L. DAVIES, for appellee.

MR. JUSTICE BAKER delivered the opinion of the Court.

It is a fatal objection to the bill in this case that it discloses no equity in favor of the complainant against the defendants, or either of them.

The assignment by Shover of his wages, earned and unearned, under his existing employment by the Railway Company as collateral security for a loan made to him by the Credit Company, gave to the Credit Company the right to maintain an action against the Railway Company, in the name of Shover, for the wages due from it to Shover while any part of said loan remained due and unpaid.

The tender by Shover to the Credit Company, if it was of the full amount justly and equitably due, did not extinguish the debt due from him to the Credit Company, nor in any way affect its right to maintain a suit against the Railway Company for the wages due to Shover.

In such suit the recovery must be for all the wages due to Shover at the time the suit was brought, for the law will not permit a creditor to split a single cause of action into two or more actions. To the Railway Company it was wholly immaterial what amount is due from Shover to the Credit Company. It was sufficient that some amount was due when the judgment was rendered to give the Credit Company the right to recover, in the name of Shover, the full amount of wages due Shover at the time the suit was brought. Whatever equity may arise from the fact that the amount due from Shover to the Credit Company is less than the amount of the judgment against the Railway Company, is an equity in favor of Shover and must be asserted by him and cannot be asserted by the Railway Company.

To the contention that equity may assume jurisdiction to

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prevent a multiplicity of suits, it is a sufficient answer to say that so long as any part of the loan, to secure which Shover assigned his wages, remains unpaid the Credit Company has the right to maintain successive actions for the amount due at the time of bringing suit, and that when that debt is paid the right of the Credit Company to bring suits in the name of Shover will cease; and that the question of the right of the Credit Company to sue, in the name of Shover, is a question for the court in which such suit may be brought.

The order appealed from will be reversed and the injunction dissolved.

Reversed.

F. H. Mitchell v. Alexander D. Hannah and David Hogg.
Gen. No. 12,414.

1. *EQUITY—when will not take jurisdiction.* A court of equity will not take jurisdiction when there is a complete remedy at law.

2. *INJUNCTION—does not lie to restrain tenant from withholding possession.* Injunction does not lie to restrain a tenant from withholding possession from the landlord upon the ground that the right of possession by the landlord has accrued through his election to terminate the tenant's lease by reason of a provision therein giving him such election in the event of the building being rendered uninhabitable by fire—forcible entry and detainer is the remedy.

Injunctive proceeding. Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1905. Reversed. Opinion filed October 6, 1905.

Statement by the Court. Appellees, the owners of the Brevoort House in Chicago, leased a store room on the first floor of said building to appellant for the term of five years from January 1, 1903. The lease contained the following clause: "In case said premises shall be rendered untenable by fire or other casualty, the lessor may, at his option, terminate this lease, or repair said premises within thirty days, and failing to do so, or upon the destruction of said premises by fire, the term hereby created shall cease and determine."

April 18, 1905, appellees filed a bill in the Circuit Court against appellant, alleging that on February 14, 1905, said building was substantially destroyed and rendered untenable by fire; that complainants elected to cancel said lease and notified the defendant in writing of such election; that said building had been destroyed by fire to the extent that it could not be repaired or made tenantable except by the destruction thereof and the erection of a new building on the site thereof; that complainants were about to erect a new building on said site at a cost of five hundred thousand dollars, and would be greatly damaged by any delay in the destruction of the old building; that the defendant refused to acquiesce in the decision of complainants that the fire had rendered the premises so leased to and occupied by him untenable, and refused to surrender the possession thereof to complainants and was attempting to retain possession thereof and to extort from complainants a large sum of money for his consent to quit such possession; that the defendant was a man of small means, unable to respond to complainants for the loss they would sustain by any delay in demolishing said building, and that unless complainants could demolish said old building and enter upon the construction of a new building they would be subjected to great loss and damage, etc.

Upon the filing of the bill the court, without notice to the defendant, ordered that a writ of injunction issue commanding the defendant to desist and refrain from in any manner interfering with the complainants in their taking possession of the said premises claimed and occupied by the defendant, or from interfering with the complainants in demolishing said building, and that he desist and refrain from withholding possession of said premises from the complainants, and from this order the defendant appealed.

MILLS, GORHAM & MILLS and LACKNER, BUTZ & MILLER, for appellant.

DEFREES, BRACE & RITTER, for appellees.

MR. JUSTICE BAKER delivered the opinion of the court.

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There is no precedent either for this bill or for the order for a temporary injunction made upon it.

The lease was complete. The defendant took possession under it, and the question whether the effects of the fire were such as to give to the complainants, the lessors, the right to terminate the lease, under its terms, could be fully tried in a proceeding under the Forcible Entry and Detainer Act. The complainants had, therefore, a plain, adequate and complete remedy at law, and the case stated in the bill does not come within the jurisdiction of a court of equity. The doctrine that when there is a complete remedy at law, a court of equity will not take jurisdiction, is so familiar and well settled that the citation of authorities in its support is not necessary. "A court of chancery will sometimes decree an adverse claimant to deliver possession to the owner, but only when such relief is incidental to the main object of the bill, and when the power of the court has been called into action for some purpose that belongs to its legitimate jurisdiction." *Cleland v. Fish*, 43 Ill., 282.

"The sole object of an interlocutory injunction is to preserve the subject in controversy in its then condition. * *

* It cannot be used for the purpose of taking property out of the possession of one party and putting it into the possession of another." *High on Injunctions*, sec. 3; *Parker v. Shannon*, 114 Ill., 192.

The sole object of the bill was the recovery of the possession, from the tenant, of the premises which had been leased to him by the complainants. This object was as effectually accomplished by the injunction which was issued in this case as it could have been by an order that in terms directed the defendant to surrender possession of the premises in controversy to the complainants. Courts of equity look to the substance, not to mere forms, and will not permit that to be done indirectly which may not lawfully be done directly.

These views of the case render it unnecessary to consider other questions that have been raised in the case.

The order appealed from will be reversed and the injunction dissolved.

Reversed.

James H. Van Vlissingen v. Caroline Roth.

Gen. No. 11,787.

1. **PROMISSORY NOTE**—*what prima facie evidence of ownership, notwithstanding endorsement.* Possession of a promissory note is *prima facie* evidence of ownership, notwithstanding an endorsement thereon by the payee to another person which appears as uncanceled.

2. **OBJECTION**—*when comes too late.* An objection which if made at the trial could have been then obviated, comes too late on appeal.

3. **TRIAL**—*discretionary with court, not to delay.* It is within the discretion of the trial court to refuse to delay a trial which has been entered upon for the purpose of giving the defendant opportunity to appear and interpose a defense.

4. **AD DAMNUM**—*when sufficiency of, cannot be questioned.* The size of the *ad damnum* cannot be questioned on appeal where the question was not raised on the trial, nor in the motion for new trial, nor in the assignment of errors.

Action of assumpsit. Appeal from the Superior Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1904. Affirmed. Opinion filed October 6, 1905.

L. W. JAMES, for appellant.

FRANK M. FAIRFIELD, for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

This is an action in assumpsit upon a promissory note made by appellant payable to appellee for \$2,500. At the conclusion of the plaintiff's evidence, no evidence having been offered by the defense, the court directed the jury to return a verdict in favor of the plaintiff for \$3004.33, which was done.

The note bears an endorsement as follows: "Pay to the order of Luella Heinroth without recourse on me. Caroline Roth." Appellant's attorney urges that the court erred in admitting the note in evidence because there was no re-endorsement to appellee by Luella Heinroth. None was necessary. The note appears to have been in possession of appellee when the suit was brought and she was the payee. Her possession was *prima facie* evidence of ownership. In

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such case the law will presume that the payee either has not parted with its possession or has paid the amount to the special endorsee, and the payee may be permitted on the trial to strike off the special endorsement. *Best v. Nokomis National Bank*, 76 Ill., 608-610; *Palmer v. Gardiner*, 77 Ill. 143-146; *Richards v. Darst*, 51 Ill., 140-141. When the note was offered in evidence objection was made to its introduction only on the ground that no proof of signature had been made. This was properly overruled and no other objection appears to have been offered. An objection which might have been obviated if made at the trial, comes too late when made for the first time in this court. It should have been stated specifically in time to afford opportunity to obviate it at the time in order to be available. *Schroeder v. Walsh*, 10 Ill. App., 36-39. There was no error in permitting the note to be read in evidence, notwithstanding the said endorsement.

It is assigned for error that the court erred in refusing proper evidence offered on the part of appellant. So far as we can discover no evidence at all was offered in defense. It appears, however, that when the plaintiff rested, the defendant's attorney stated to the court that "the defendant was here a moment ago. I believe he is in the hall. If you will stay the trial a moment I will call him." The court replied, "I don't think we will wait for him"; and thereupon prepared and gave the instruction to the jury to find in favor of the plaintiff. No reason is assigned for the defendant's absence. It was his duty to be present to give his testimony if he had any defense to offer. There is no reason to suppose so far as appears from the record that he had any. Indeed it seems quite obvious that he did not have. It was within the discretion of the court to wait or not as should be deemed proper. *Illinois Central R. R. Co. v. Slater*, 139 Ill., 190-200. It is quite evident that there was no abuse of that discretion in this case. *Brunson v. Clark*, 151 Ill., 495.

The original *ad damnum* was, it is said, \$3000. The verdict was \$4.33 in excess of that sum. No specific objection calling attention to this alleged error appears in the record.

The motion for a new trial states as one of the reasons assigned that the "verdict was excessive." Even that does not appear in the assignment of errors. The objection that a verdict exceeds the *ad damnum* cannot be raised in this manner. If in this case it does so exceed it, the fact should have been pointed out to the trial court where the correction would have been promptly made. As said in *The Prairie State Loan & Building Association v. Gorrie*, 167 Ill., 414-419: "It should have been specially stated in the objection that the amount of the verdict exceeded the *ad damnum*." In the absence of such specific objection the question cannot be raised for the first time in this court. *Traders Mut. Life Ins. Co. v. Humphrey*, 109 Ill. App., 246-259.

The judgment of the Superior Court will be affirmed.

Affirmed.

Henry Madl, administrator, v. Chicago City Railway Company, et al.

Gen. No. 11,862.

1. NEW CAUSE OF ACTION—*when amended declaration does not state.* An amended declaration does not state a new cause of action where it differs from the original declaration in that it contains, while the original declaration did not, an allegation of due care upon the part of the plaintiff at the time of the injury complained of.

Action on the case for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1904. Reversed and remanded. Opinion filed July 11, 1905. Rehearing denied October 10, 1905.

Statement by the Court. This action is brought to recover damages for personal injuries inflicted May 29, 1901, in consequence, it is alleged, of appellees' negligence and resulting in the death of Henry Alfred Madl, which the declaration states occurred July 14, 1901. The praecipe was filed and summons issued against the Chicago City Railway Company July 24, 1901, and the summons was

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returned served July 31, 1901. The original declaration was filed August 9, 1901. Nearly two years thereafter, July 3, 1903, by leave of court, the Chicago, Rock Island and Pacific and the Lake Shore and Michigan Southern Railway Companies were joined as parties defendant. Summons was served on them and an amended declaration filed the same day. Subsequently on May 20, 1904, nearly three years after the accident, by leave of court appellant amended his declaration last referred to by inserting on its face after the statement that the deceased was "a passenger upon said street car" the following in parenthesis: "(and was then and there quietly and carefully standing on the footboard of said car, on the right side of said car, and exercising due care for his own safety.)" After this amendment, each of the defendants separately filed pleas of the general issue and also of the Statute of Limitations, to the last of which appellant demurred. These demurrers were overruled and judgment entered accordingly.

The several pleas of the Statute of Limitations are in part as follows: "Because it says that the several supposed causes of action mentioned in the said declaration as amended on the 20th day of May, A. D., 1904, did not, nor did any or either of them, accrue to the plaintiff at any time within two years next before the amending of said amended declaration on the face thereof as above set forth, in manner and form as the plaintiff has above complained against it."

JAMES R. WARD, for appellant.

WILLIAM J. HYNES, SAMUEL S. PAGE and WATSON J. FERRY (MASON B. STARRING, of counsel), and GLENNON, CARY & WALKER and BENJAMIN S. CABLE, for appellees.

MR. JUSTICE FREEMAN delivered the opinion of the court.

It is sought to reverse the judgment in this case upon the ground that the Circuit Court erred in overruling the demurrers to the pleas of the Statute of Limitations. The ground upon which this ruling was based is that inasmuch as neither the original nor amended declarations contained any allegation of the absence of contributory negli-

gence or the exercise of due and ordinary care on the part of the intestate at and before the time of the accident, prior to the amendment upon the face of the amended declaration which was made May 20, 1904, nearly three years after the accident and death of the intestate, such amendment was too late and the Statute of Limitations was well pleaded. It is clear that the amendment of May 20, 1904, was made more than two years after the cause of action accrued. If it stated a new cause of action, it was within the bar of the Statute of Limitations. *Foster v. St. Luke's Hospital*, 191 Ill., 94-95. The question is, therefore, whether the amended declaration as it stood prior to May 20, 1904, sufficiently stated a cause of action, without an averment of due care on the part of the deceased.

It is not claimed that elsewhere in the declaration there is any averment to the effect that the deceased was in the exercise of due care at the time of the accident, nor any statement of facts equivalent to such averment or from which such care is properly inferable. The amendment in controversy, that the deceased was "quietly standing on the foot-board of said car on the right side of said car and exercising due care for his own safety" is the only statement to that effect, although it appears in the original declaration that deceased was a passenger. Appellant argues that the cause of action is the act or thing done or omitted to be done by one which confers the right upon another to sue, that the exercise of due care by the person injured is not the cause of action, and that the amendment did not bar the right of recovery upon the cause of action already stated in the declaration. In *Chicago City Railway Co. v. Cooney*, 196 Ill., 466-469, an amendment was filed to which it was sought to interpose the bar of the statute and it was held that the original declaration stated a cause of action, though defectively, because it would have been sufficient after verdict on motion in arrest of judgment or on error; that the cause of action stated in the amended declaration was identical with the one stated in the original declaration, and the amendment which contained the additional allega-

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tion that the plaintiff was in the exercise of ordinary care for her own safety, amounted only to a restatement of the cause of action and not to a statement of a new cause of action; that hence the demurrer to the plea of the Statute of Limitations was properly sustained. This seems to sustain appellant's contention, since if the cause of action containing an averment of due care is nothing more than a restatement of a cause of action without such averment, it would seem that the exercise of due care by the deceased is not a part of the cause of action. The principle upon which a defective statement of a good cause of action is cured by verdict is stated in Ill. Cent. R. R. Co. v. Simmons, 38 Ill., 242-243, to be that "when anything is omitted in the declaration, though it be matter of substance, if it be such as that without proving it at the trial plaintiff could not have a verdict, and there be a verdict for the plaintiff, such an omission shall not arrest the judgment." Hence it is said that after verdict, defects in substance are cured, if from the issue in the case the facts omitted or defectively stated may fairly be presumed to have been proved on the trial. If, however, a declaration omits to allege any substantial fact which is essential to a right of action and which is not implied or inferable from the finding of those which are alleged, a verdict for plaintiff does not cure that defect. Bowman v. People, 114 Ill., 474-477. As to whether an averment of due care for his own safety on the part of a plaintiff seeking to recover for personal injuries alleged to have been caused by the negligence of one or more defendants is necessary, the expressions of the courts have not been uniform. In Cox v. Brackett, 41 Ill., 222-225, it is held, following Ill. Cent. R. R. Co. v. Simmons, *supra*, that it was not necessary. In Consolidated Coal Co. v. Wombacher, 134 Ill., 57-63, it is said that the question of the plaintiff's contributory negligence was matter of defense which need not have been anticipated and negatived in the declaration. It has been repeatedly said that the cause of action may be regarded as the act or thing done or omitted to be done by the defendant toward the plaintiff which causes a grievance for which the

law gives a remedy. *Swift & Co. v. Madden*, 165 Ill., 41-45; *Chicago City Ry. Co. v. Leach*, 182 Ill., 359-364. In the last cited case it is held not necessary to aver specifically that plaintiff and another were not fellow-servants. It was sufficient that the facts set up established that relation. On the other hand it is said in a number of cases to be a general rule that in order to recover for injuries from negligence it must be alleged as well as proved that the party injured was at the time he was injured observing due and ordinary care for his personal safety. *Calumet I. & S. Co. v. Martin*, 115 Ill., 358-368; *Jorgenson v. Johnson Chair Co.*, 169 Ill., 429-430; *Gerke v. Fancher*, 158 Ill., 375-379. Some of the appellate courts of this state have followed the same rule. In some of the cases the statement that due care must be alleged as well as proven is obviously *dictum*. In the case last above cited it is held (p. 380) that although there is in that case no allegation of due care in express terms, the fact being, however, alleged argumentatively, yet on motion in arrest of judgment, in view of the presumptions in favor of plaintiff after judgment the declaration would be held sufficient, the defect being cured by verdict. But it is said also that "before verdict the intendments are against the pleader, and upon demurrer to a declaration, nothing will suffice by way of inference or implication, in his favor"; thus indicating that if the question had arisen on demurrer to the declaration the latter would have been held bad for want of an allegation of due care. In most of the states, however, it is said, the plaintiff need not allege the absence of contributory negligence on his part. (The *Encyclo. of Pl. and Pr.*, Vol. 5, p. 1.) It is unnecessary, we think, to follow the discussion farther, in view of the latest holding of the Supreme Court in *Chicago City Ry. Co. v. Cooney*, *supra*, which concludes us on that question. Appellees' attorneys have gone to the original record in that case, in which it appears that the original declaration contains the statement that the plaintiff "was seated" in the car at the time of the accident. The same statement appears in the quotation from the

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declaration in the statement of the court (p. 467), but it is said, nevertheless, that the original count "contained no allegation of due care on the part of the plaintiff." It appears, therefore, that those words in the original declaration had no bearing on the conclusion stated, viz., that the demurrer to the plea of the Statute of Limitations was properly sustained.

It follows that the demurrers to the pleas of the Statute of Limitations were improperly overruled and the judgment of the Circuit Court must be reversed and the cause remanded without reference to whether the declaration is in some other respects open to objection or not.

Reversed and remanded.

Laguna Valley Company v. James G. Fitch.

Gen. No. 11,910.

1. **AGENT**—*when legal presumption of personal liability exists.* The legal presumption, in the absence of evidence, is that the agent is liable only where the principal is not known or where the agent undertakes in his own name or, exceeds his power; it is presumed otherwise that he intended to bind his principal since an agent should not be regarded as personally bound unless such intention is expressed in the contract.

2. **ATTORNEY'S FEES**—*when corporation liable for, notwithstanding claim therefor filed against the estate of its agent contracting therefor.* A corporation is liable to an attorney for services rendered to it with its knowledge and recognition, notwithstanding such attorney, prior to suit against it, had filed a claim against the estate of the president of such corporation who had provided for the rendition of such services, where such claim was filed in good faith under the impression that both the principal and agent were liable.

Action of assumpsit. Appeal from the Circuit Court of Cook County; the Hon. JULIAN W. MACK, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1904. **Affirmed.** Opinion filed October 6, 1905.

Statement by the Court. This is a suit by appellee to recover for legal services claimed to have been rendered for the appellant, a corporation organized under the laws of the territory of New Mexico. The cause was submitted to the trial court without a jury.

It is conceded by appellant that appellee was employed in February 1893 by one Wilson Waddingham, president of the appellant company, which was then known as the Valverde Land and Irrigation Company. Under such employment he prosecuted certain ejectment suits against parties then occupying land belonging to appellant situated in New Mexico. He continued in such employment until the death of Waddingham which occurred about May 16, 1899. During that time he was employed in suits brought both by and against appellant, acting under the general instructions of appellant's counsel in New York City. After Waddingham's death he was continued in the company's employment and rendered services as its attorney, for which it is claimed, however, that he has been paid by appellant in full. A resolution was adopted by the stockholders of appellant, in which the company authorized its former general attorney, who had then gone to New Mexico to reside, to make settlement as its agent with the authorities of New Mexico of certain taxes, and further authorized him "to cause any proper document or documents to be executed either by himself or by the attorney of this Company in New Mexico, James G. Fitch, and any and all acts of either said Mills or said Fitch in respect to the subject-matter of this vote are hereby ratified and confirmed." There is also in evidence a letter to appellee dated November 1, 1895, written by said Mills, who was at the time acting as counsel for appellant, in which it is said that "as soon as the company gets money I will come out and we will together settle the taxes and when we do that I will see that you get a good fee." It is said in appellant's brief "as to the amount of appellee's services, and the value thereof, there is no dispute, but there is a dispute as to said legal services having been rendered

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for the Laguna Valley Company, formerly known as the Valverde Land and Irrigation Company."

LORENZO E. DOW and CHARLES A. ALLEN, for appellant.

GANN, PEAKS & HAFFENBERG, for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

It would seem from the evidence there can be no room for reasonable doubt that appellee was recognized and treated by the company itself as its attorney in New Mexico before as well as after Waddingham's death, that the services in controversy were rendered solely for that company and that appellee was promised a good fee for such services by the attorney of the company having at the time general supervision of its litigation in New Mexico, "as soon as the company gets money."

The defense made in behalf of appellant is, that in March 1900 appellee filed a claim in a probate court in New Mexico against the estate of Wilson Waddingham, deceased, the former president of appellant, and that in an affidavit thereto attached he stated that Waddingham in his lifetime was indebted to appellee for legal services rendered deceased at his request and for money expended in the sum of \$2,173.75, which claim was allowed, although no part of it has ever been paid; also that subsequently appellee filed a claim, also sworn to, against the estate of said Waddingham for the same services and expenditures in the Probate Court at New Haven, Connecticut, which claim was still pending when the present suit was commenced. It is contended in appellant's behalf that these sworn claims made against the estate of Waddingham tend to show that appellee made charges for his services rendered solely to appellant, against Waddingham personally and not against the appellant company of which Waddingham was president when appellee was employed; that appellee is in the position of having contracted with Waddingham as agent for an undisclosed principal, and that appellee elected to resort to the agent Waddingham with full knowledge of the facts,

and cannot now maintain his action against appellant, the real principal. The legal presumption is, however, in the absence of evidence to the contrary, that the agent is liable only where the principal is not known or where he undertakes in his own name or exceeds his power. It is presumed otherwise that he intended to bind his principal, since an agent should not be regarded, as personally bound unless such intention is expressed in the contract. *Spry Lumber Co. v. McMillan*, 77 Ill. App., 280-284, and cases there cited; *Whitney v. Wyman*, 101 U. S., 392-396; *Stanton v. Camp*, 4 Barb. (N. Y.) 274-278. In the case at bar, the principal was never undisclosed. The services in controversy were rendered wholly to appellant, the principal, from the outset. There is no evidence of any intention on the part of the agent Waddingham to be bound, and no evidence that appellee understood that the president was acting for himself or that appellee considered himself as employed by Waddingham personally, unless it be the fact that he presented a claim against the latter's estate in the probate courts. Appellant knew that appellee was acting as its attorney and afterward recognized him as such upon its records.

Appellee's explanation of his action in making claim against the estate of Waddingham in the probate courts is that the appellant corporation had failed to comply with certain provisions of the statute of New Mexico in reference to corporations, particularly in failing to have an agent in New Mexico upon whom service could be had; that he therefore believed Waddingham, its president, to be personally liable for the debts of the corporation, under provisions of the statute of that territory; and that therefore he undertook to enforce what he considered a statutory liability against the president's estate. Appellant's attorneys indulge in a legal argument, the purpose of which is to show that appellee is mistaken in claiming that such statutory liability existed under the laws of New Mexico, and it is insisted we must therefore presume that appellee in fact made his original charges against Waddingham personally and re-

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garded himself as employed solely by and for Waddingham and not by and for the appellant company. We deem it immaterial whether appellee was or was not right in a legal sense in his attempt to enforce an assumed statutory liability against Waddingham's estate. But if he be deemed wrong in point of law, upon which we express no opinion, yet if acting in good faith in the belief that he had a valid claim against the president of appellant as well as against the company, and a legal right to enforce such claim against the president's estate—and there is no evidence that he was not so acting in good faith—such action, though mistaken, cannot with any propriety under the circumstances be deemed or treated as an election by appellee to look to the estate of the deceased president and abandon his claim against appellant for compensation for services rendered exclusively to the latter. Much less can it be deemed evidence tending to show that appellee made his charges for the services in question exclusively against the president personally and not against the appellant company. It is urged that the claim filed in the New Mexico Probate Court does not expressly set forth that the services were rendered for the company, that Waddingham was its president, that the company had been guilty of a violation of the statute and that hence Waddingham became liable to appellee. It must suffice to say, however, that whether Waddingham or other officers be deemed jointly liable with appellant or not, there is in this record nothing so far as we discover tending to show that appellee was employed by Waddingham exclusively or that he regarded or treated Waddingham as his sole debtor for the services sued for. Merely commencing a suit against the agent does not operate as an election to discharge the principal. "There must be acts indicating an intent with full knowledge of all the facts, to give sole credit to the agent and abandon all claim against the principal." *Ferry v. Moore*, 18 Ill. App., 135-141. No such evidence appears in this record.

The judgment of the Circuit Court is affirmed.

Affirmed.

Charles H. Thomas, et al., v. Maude B. Ellis, et al.

Gen. No. 11,917.

1. **MASTER'S FINDING**—*advisory to chancellor*. The findings of a master in chancery, while *prima facie* correct, are only advisory to the chancellor and it is the right and duty of the latter to disregard them and sustain proper exceptions to the master's report, where upon careful consideration the findings of the latter are found to be erroneous.

Foreclosure proceeding. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1904. Reversed and remanded with directions. Opinion filed October 6, 1905.

DANIEL M. ROTHSCHILD, for appellants.

GEORGE J. GILBERT, for appellees.

MR. JUSTICE FREEMAN delivered the opinion of the court.

This is a bill wherein appellees seek to foreclose a trust deed made to secure two notes, one for fifty and the other for two hundred dollars, which it is alleged were executed to secure indebtedness of that amount to appellees, but which by mistake it is claimed remained in the hands of the makers and were never delivered. Appellants deny the existence of any indebtedness, state that the notes were never delivered, and that although they executed the trust deed and it was recorded they received no consideration therefor. They file a cross-bill in which they set forth that the trust deed was executed when they were intending to give said deed and the notes thereby secured for a part of a then existing debt, which they had an option either to pay in full or extend as to the two hundred and fifty dollars as they might elect; that after the said trust deed was recorded they concluded to and did pay the said debt in full, and thereupon the notes secured by the trust deed in controversy were returned to them. They ask for a release of the trust deed.

The cause was referred to a master to take testimony and

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report his conclusions. The master reported that the evidence offered in behalf of appellees was "more than counter-balanced by the evidence offered in behalf of" appellants, and the allegations of the bill were not sustained by the evidence. He found "specifically that the evidence establishes the fact that the defendant Thomas paid the balance of \$250, in full satisfaction" of the debt to appellees; that "the evidence of B. W. Ellis is the only positive evidence in the record that Thomas did not pay \$250, while Thomas testifies that he did, his wife testifies that Thomas did and that she gave him money which he needed to make up the \$250, in Ellis' office, and Thomas' son also testifies that he was present in the office at the time and saw his father pay money to B. W. Ellis."

It is true the master's findings while *prima facie* correct are only advisory to the chancellor (Fairbury Agricultural Board v. Holly, 169 Ill., 9-12), and it is the right and duty of the latter to disregard them and sustain proper exceptions to the master's report, when upon careful consideration the findings of the latter are found to be erroneous. It is also true that this court, with the full record before it, as in this case, possesses equal opportunities to determine whether under the evidence the findings and decree of the chancellor are correct. In the present case we are compelled to the conclusion that the findings of the master are sustained by the greater weight of evidence. To review the evidence in detail would involve needless expenditure of time and labor. It must suffice to say that the notes described in the trust deed and remaining in the hands of the makers, appear from the evidence to have been made to represent an indebtedness which was afterwards fully paid. The decree of the Circuit Court will therefore be reversed and the cause remanded to that court with directions to dismiss the original bill and grant the relief prayed for in the cross-bill.

Reversed and remanded with directions.

Patrick McLain, administrator, v. Chicago & Northwestern Railway Company.

Gen. No. 11,923.

George Gabriel, administrator, v. Chicago & Northwestern Railway Company.

Gen. No. 11,924.

1. NEGLIGENCE—*when railroad company not guilty of, towards persons wrongfully on its grounds.* Where persons undertake to cross railroad tracks by passing over the grounds of a railway company, even though they do not know that they are upon such grounds, they do so at their peril, notwithstanding the company had not previously seen fit to enforce its rights and prevent people from crossing there, and such company is not bound to protect or provide safeguards for such persons so using its grounds.

2. RES IPSA LOQUITUR—*when doctrine of, does not apply.* This doctrine does not apply in favor of one who is a trespasser or one who is at the place of injury under a permission or mere naked license.

Action on the case for death caused by alleged wrongful act. Appeals from the Superior Court of Cook County; the Hon. ROBERT W. WRIGHT, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1904. Affirmed. Opinion filed October 6, 1905.

Statement by the Court. These suits are brought to recover for the same cause of action, viz. alleged negligence causing the death of two women in the same accident upon the tracks of the Chicago & Northwestern Railway Company at Evanston in Cook County. The suits were consolidated for trial in the Superior Court and have been consolidated here.

The accident occurred the evening of January 26, 1900. The deceased, Mrs. Maria McLain and Mrs. Pauline Gabriel, lived on the west side of the railroad. They were returning homeward in a buggy drawn by a gentle horse from a visit on the east side. They were observed driving along in an ordinary way, about two blocks apparently from the place where the accident occurred, and their bodies were found shortly after when, as the witness states, it "was just

getting dusk and the electric lights were lit." It is said there were no witnesses to the accident. One of the women, Mrs. Gabriel, was still alive and conscious when she was picked up, and told a police officer that they were on the way home "and came down Sherman avenue to what she thought was Church street, but instead of turning on Church street she turned on Clark street, which she supposed was Church street." On Church street there was a regular public crossing. Clark street is one block north of Church. The place of the accident was at or near what would have been the intersection of Clark street in the city of Evanston with the railroad tracks of appellee, if Clark street had been opened across the railroad right of way. This had never been done. The railroad company owned the fee of the right of way and no provision of any kind had been made there for the crossing of teams or persons. There are five tracks at this point, the eastward of which—and it was from the east the deceased attempted to cross—was used as a switch and storage track upon which cars were placed to be loaded or unloaded and where they could be reached by teams driven alongside the track. This track was a little above the level of the adjoining street known as East Railroad avenue, which runs adjacent to and parallel with the railroad right of way. The next track is stated in appellant's brief to be elevated from fifteen to eighteen inches above the switch track and there is evidence tending to show the difference in grading between the east or teaming track and the main track next west is "about twenty inches and quite abrupt," the embankment consisting of cinders and crushed stones. The photographs in evidence show the rails standing up above the ties, with no planking or roadway of any kind and with no provision for passing over either for teams or foot passengers. At the time of the accident a freight car was standing on the switch track a little north of where the center of Clark street would be if extended across the tracks. It appears from tracks made by a buggy that the deceased approached from the north, turned westward and passed over the switch track a few feet south of the freight

car there standing and on to the main tracks where they were struck almost immediately afterward by an approaching train. The trial court instructed the jury to find the defendant not guilty.

ELMER H. ADAMS, for appellants.

S. A. LYNDE, for appellee; LLOYD W. BOWERS, of counsel.

MR. JUSTICE FREEMAN delivered the opinion of the court.

It is contended that the court erred in directing a verdict for the defendant; that whether or not the deceased were exercising due care for their own safety, whether they were trespassers and whether the railroad company was negligent in failing to protect that part of their right of way where the accident occurred were questions of fact which should have been submitted to a jury.

There is no controversy as to the material facts. It is urged that the railroad company was negligent in failing to protect that part of its right of way so as to prevent injury to persons making the mistake of supposing that it was a public crossing. It is said that persons coming west on Clark street looking across the railroad tracks could see Clark street continued on the other side and would naturally suppose that the street crossed the railroad; that in fact it was used as a public crossing prior to and at the time of the accident. There is evidence which tends to show that in a few instances light or unloaded wagons had been driven across the tracks at this point and that persons on foot were in the habit of crossing there whenever convenience dictated. There is no evidence, however, that the railroad company had done anything to encourage such use. Cars were stored along the switch track at such places as desired without reference to convenience of anyone who might desire to cross. The tracks stood up above the surface of the ground in such a way as to make crossing difficult for a wagon or buggy, and there was no provision for crossing by teams or foot passengers. The company owned

the right of way in fee. It appears that those who were in the habit of crossing the tracks there occasionally, knew and recognized the fact that it was not a public crossing. Indeed this seems to have been so obvious that so far as appears no one ever made the mistake of supposing it to be such. One of the unfortunate victims of this accident, Mrs. Gabriel, explained their presence there to be owing to a mistake in locality, not on the ground that they thought there was a public crossing on Clark street. There is evidence which tends to show that persons were in the habit of crossing in the entire open space between the streets running east and west either side of Clark street as well as where Clark street if extended would have crossed the right of way. According to testimony given by a witness for appellants "they did that when they wanted to go anywhere in the space between Emerson street and Church street. I do not know of any particular place where they were in the habit of crossing." Such use as this testimony discloses would not in law create a public crossing nor give to the public a right of way. The deceased were not authorized, because the railroad company had not previously seen fit to enforce its rights and prevent people from crossing there, to use it for their own convenience. When they did so, though it may be by mistake, it was at their peril, and the company "was not bound to protect or provide safeguards for persons so using its grounds for their own convenience. The place was one of danger and such persons went there at their own risk, and enjoyed the supposed implied license subject to its attendant perils. At the most there was here no more than a mere passive acquiescence in this use. A mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owner to provide against the danger of accident." *I. C. R. R. Co. v. Godfrey*, 71 Ill., 500-507. It was held in the case thus cited that the plaintiff stood "in no more favorable position than that of a wrongdoer and trespasser," and that when thus in the wrong or not in the exercise of a legal right or while at the time enjoying a privilege or favor granted without com-

pensation or benefit to the party granting it of whose carelessness complaint is made, such person "must use extraordinary care before he can complain of the negligence of another." To the same effect is *I. C. R. R. Co. v. Hetherington*, 83 Ill., 510-513; *Wabash R. R. v. Jones*, 163 Ill., 167-172, *et seq.*; *I. C. R. R. Co. v. O'Connor*, 189 Ill., 559-565-6; *James v. I. C. R. R. Co.*, 195 Ill., 327-333; *Smith v. C. & E. I. R. R. Co.*, 99 Ill. App., 296-299. In attempting to cross the tracks at that point the deceased were undoubtedly trespassers, and the railroad company owes "no duty to a trespasser upon its right of way or tracks except that it will not wantonly or willfully inflict injury upon him." *I. C. R. R. Co. v. O'Connor*, 189 Ill., 559-564, *supra*. The deceased were not injured on or near depot grounds and *I. C. R. R. Co. v. Hammer*, 72 Ill., 347, cited by appellants, is not in point.

The only question presented is whether the trial court erred in directing the jury to find a verdict in favor of the defendant. It is evident from what has been said that there could be no recovery under the evidence except upon proof that the injuries were inflicted by a wanton and reckless disregard of duty on the part of the appellee or its employees. No such claim is made and none could be under the evidence. If Clark street had been laid out by the municipal authorities and opened on either side of appellee's right of way and persons were in consequence sometimes led to trespass on the railroad for convenience, appellee was not responsible. There was no evidence in the case which with all its legal inferences fairly tended to establish the plaintiff's cause of action. The rule *res ipsa loquitur* has no application in the case. *C. & E. I. R. R. Co. v. Reilly*, 212 Ill., 506-510.

The judgment of the Superior Court must be affirmed.

Affirmed.

W. M. Sanford, et al., v. The People of the State of Illinois.

Gen. No. 11,268.

1. CONSPIRACY—*common law offense of, not superseded.* The General Conspiracy Statute of 1874 did not repeal the common law with respect to criminal conspiracy.

2. CONSPIRACY—*act of 1891 did not repeal conspiracy statute of 1874.* The act of 1891 pertaining to trusts, pools and combinations did not operate to repeal the general statute of 1874.

3. CONSPIRACY—*when combination is illegal and criminal.* A combination, the tendency and manifest intent of which is to prevent general competition and so to control trade in a community and to enable members of such combination to dictate prices, is illegal and in violation both of the common law, the general conspiracy act of this State, and the act of 1891 pertaining to trusts, pools and combines.

4. CONSPIRACY—*what not essential to render combination in restraint of trade illegal.* To render such a combination illegal and criminal, it is not essential that it should appear that it did, in fact, create a monopoly.

Criminal prosecution for conspiracy. Error to the Criminal Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1903. Affirmed. Opinion filed October 6, 1905.

Statement by the Court. January 19, 1903, a special grand jury returned into the Criminal Court of Cook county an indictment containing eight counts against the plaintiffs in error herein for a conspiracy to do an illegal act injurious to public trade, etc.

The first count charges that the defendants "unlawfully, fraudulently, maliciously, wrongfully and wickedly did conspire and agree with one Delos Hull" and other persons whose names are unknown "to do an illegal act injurious to the public trade, to wit: to then and there in restraint of trade and to the injury of the public trade, unlawfully create, enter into and become members of and parties to a pool, trust, agreement, combination, confederation and understanding with each other to suppress, destroy and prevent

competition in the sale and delivery and distribution of coal to consumers and to the general public in the State of Illinois and in the State of Wisconsin to the great damage and injury of all purchasers of said coal and contrary to the statute and against the peace and dignity of the State of Illinois."

The second count is practically the same. The third count charges that the conspiracy and combination were "then and there to unlawfully regulate and fix the price at which coal should be sold in the State of Illinois," the same being "an article of necessity to consumers thereof and to the general public" and an article of merchandise. The fourth count charges that the purpose of the conspiracy was "to regulate, fix and raise the price at which coal should be sold."

The fifth count charges a conspiracy to suppress competition "by limiting sales of coal made or to be made to consumers in such localities to retail vendors thereof only and by limiting the territory in which the members of said combination or conspiracy engaged in business of selling coal at retail should thereafter make sales and delivery of coal to consumers, and by limiting the right of wholesale dealers in coal to make sales and delivery of coal to consumers, and by limiting the right of wholesale dealers in coal to make sales and delivery of coal to only such persons as conformed to the rules and regulations of said members of said combination and conspiracy," which rules required each person selling coal to comply with conditions specified.

The sixth count charged that the defendants each then and there being engaged in or interested in the business of selling to the general public, and then and there in competition with various retail dealers in said business, and unlawfully contriving and intending unjustly and oppressively to increase and raise the price at which the coal to be sold by them should be sold, and to suppress and destroy competition among the said several retail dealers and vendors of coal and to fix a price at which said coal should be sold unlawfully then and there did combine, confederate, conspire and agree together with one Delos Hull and other persons whose names

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are unknown, to raise, fix and keep up the prices at which coal should be sold in the respective localities in the State of Illinois and the State of Wisconsin in which said conspirators were and might be engaged or interested in the business of selling coal to the consumers thereof, and to that end did unlawfully in pursuance of and as part of said conspiracy agree that none of the members of said conspiracy and confederation would make or cause to be made any shipments of coal into the territory that might be recognized among the said members of said conspiracy as the territory to which such members should confine his or their sales and delivery of said coal, and to that end did unlawfully in pursuance and as a part of said conspiracy agree that coal should not be sold by them or either of them at a price below a certain fixed minimum price then fixed and from time to time agreed to be fixed by them jointly or through a committee appointed or to be appointed for said purpose, such minimum price being greatly in excess of the prices at which coal had been accustomed to be sold in said territory, to the great injury of purchasers of said coal and contrary to the law.

The seventh count charged that said defendants conspired to increase, raise and keep up the price at which coal should thereafter be sold in the State of Illinois and the State of Wisconsin, and to suppress, destroy and prevent competition in the sale of coal in said states.

The eighth count charges that the defendants conspired, combined, confederated and agreed to create, enter into and become members of and parties to an agreement, combination, confederation and understanding with each other then and there to suppress, destroy and prevent competition in the sale of said coal in the respective states and parts of states in which each respectively was engaged or interested in said business of selling coal as aforesaid, directly to the consumers thereof, and in pursuance of said unlawful agreement and combination, formed themselves into a voluntary association called the Retail Coal Dealers Association of Illinois and Wisconsin, for the purpose of preventing shipment, delivery and sale of coal by any mine operator, wholesale ship-

per, jobber or their agents, to any consumer except to railroads, gas companies, blast furnaces, transportation companies and manufacturers where said coal is used for manufacturing purposes only in Illinois and Wisconsin, where there is a member of said association engaged in the business of selling and delivering coal to consumers and for the purpose of restricting competition among the members of said association by limiting the right of any member to make sales and delivery of coal in the territory or locality recognized by said association and its members as the territory of other members of said association, etc.

A motion to quash the indictment was overruled, the defendants were arraigned and pleaded not guilty. Upon the trial the jury returned a verdict finding each of the defendants "guilty of conspiracy in manner and form as charged in the indictment" and fixing the punishment of each defendant at a fine.

The bill of exceptions shows an agreed statement of facts upon which the case was submitted, being received as the only evidence of facts in the trial. Such agreed statement is in part as follows:

"That the Retail Coal Dealers' Association of Illinois and Wisconsin is a voluntary association, whose membership is composed of certain retail dealers in coal in the states of Illinois and Wisconsin; that said association was organized more than three years ago in the City of Chicago, County of Cook and State of Illinois, and has maintained its office during its entire existence in said city; that its officers are elected annually; that its officers elected and serving for the year from July 1, 1902, to July 1, 1903, are as follows, to wit: President, W. M. Sanford; vice-president, C. S. Lusk; secretary, Frank E. Lukens; treasurer, Gus Aucutt; executive board, E. H. Keeler, Delos Hull, Frank McGrew, F. M. Durkee, C. L. Marston and R. C. Brown, being parties named in the indictment herein; that all of said parties were acting in the capacity of said officers, respectively, at the time of the indictment herein; that each of said persons, with the

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exception of Frank E. Lukens, had been personally engaged in the business of selling coal at retail for more than three years past, each in his respective locality in the State of Illinois or State of Wisconsin; that said Frank E. Lukens has not been engaged in the business of selling coal at wholesale or retail since the organization of said association, but has acted as secretary of said association during its existence; that the residences of the several defendants, respectively, are as stated in the pamphlet hereinafter set forth containing the constitution and by-laws of said association; that all of said defendants except Lukens are engaged in the retail coal business at said places respectively; that all of said defendants are citizens of the United States."

Then follows the constitution and by-laws adopted by said association and in force since January 1, 1901; parts of which not deemed material are omitted from this statement.

CONSTITUTION.

ARTICLE I.

NAME AND OBJECT.

SECTION 1. The title of this organization shall be "Retail Coal Dealers' Association of Illinois and Wisconsin."

SEC. 2. The object of this Association shall be the protection of its members against the shipment of coal direct to consumers or scalpers, by mine operators, wholesale shippers, jobbers, or their agents, and the general improvement and elevation of the coal trade in the States of Illinois and Wisconsin.

ARTICLE II.

MEMBERSHIP.

SECTION 1. Any firm, individual or corporation, owning or leasing and operating a coal yard, having a set of scales, keeping an office during regular business hours, with a competent person in charge to attend to the wants of customers at all times, and who has storing capacity for one or more cars of coal, and is REGULARLY and CONTINUOUSLY

engaged in the sale of coal at retail in the States of Illinois and Wisconsin, shall be eligible to membership in this Association.

SEC. 2. A person buying carloads, and delivering direct from the same, shall not be considered a dealer within the meaning of this Article.

SEC. 3. Mine operators, wholesale shippers, jobbers, or their representatives, may become honorary members of this Association, and such membership shall entitle them to all the privileges of the Association, except the right to vote in any of the transactions of the meetings of the Association or the Executive Board.

ARTICLE III.

COMPLAINTS.

SECTION 1. All complaints shall be made to the secretary in writing, giving as full information as possible, including dates of shipment and arrival, car number and initials, original point of shipment, names of consignor and consignee and any other particulars that can be learned.

SEC. 2. All complaints to be handled by this Association must be filed with the secretary within sixty days after receipt of shipment at point of destination, and no complaint from any member will be considered when made on account of sales or shipment made within thirty days after the date of said member's certificate of membership.

SEC. 3. Nothing in the foregoing sections shall be construed so as to entitle members to make complaints on account of sales and shipments of anthracite and bituminous coal, coke, smithing coal, etc., to railroads, gas companies, blast furnaces, transportation companies, or manufacturers, where said coal is used for manufacturing purposes only.

SEC. 4. It shall be contrary to the principles of this Association for any mine operator, wholesale shipper, jobber or their agents to ship coal upon the order of a regular coal dealer, for delivery at any point other than where such dealer may have a yard and is regularly established in the business,

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and any mine operator, wholesale shipper, jobber or their agents, making such shipment into the territory of other retailers, who are members of this Association, will be considered as having sold or shipped a consumer.

SEC. 5. It shall be contrary to the spirit of this Association for any of its retail members to make or cause to be made, shipments into the legitimate territory of other members of the Association, and members who shall offend shall be subject to the same conditions as shipments made by wholesale members.

SEC. 6. Shipments for public or private schools, city and county buildings, shall be considered as shipments direct to consumers.

SEC. 7. It shall be the duty of the secretary to at once notify the party or parties against whom complaint has been made. If the transaction was made through or by a jobber, mine agent, or other person, the principal for whom they act or the shipper from whom they receive the coal shall also be notified and shall be considered jointly liable.

SEC. 8. If it be found impossible to adjust a claim through the efforts of the secretary, then the matter shall be referred to the Executive Board, whose decisions shall be final and binding on all parties.

ARTICLE IV.

TERRITORY.

Members shall be entitled to the protection of this Association at only such places where they operate yards as they shall desire to have placed on the membership lists, and for which they shall pay annual dues for each place so protected.

ARTICLE IX.

RECIPROCITY.

Whereas, As reciprocity is in direct line with the principles of this Association, we hereby pledge ourselves to purchase goods of only those mine operators, wholesale shippers, jobbers or their authorized representatives who recognize the

principles of this organization and make it their uniform practice to distribute their goods only through the legitimate channels of the trade, and who may be eligible to honorary membership in this Association.

SECTION 6.

EXECUTIVE BOARD.

It shall be the duty of the Executive Board to hear and determine all complaints made by any member of this Association, when duly reported to them by the Secretary, and their decision shall be binding upon all members of this Association. They shall have the power, by a two-thirds vote, to remove or suspend any official for any just cause, and appoint a member of the Association to fill the vacancy. Furthermore, they shall have the power, by a two-thirds majority vote, to suspend or expel any member for any conduct which in their opinion might endanger the welfare, interest or character of the Association. No vote shall be taken on a proposed suspension or expulsion until after ten days' notice in writing has been sent the member in question, setting forth the charges preferred against him or them. The defendant shall have the right to be heard, either in person or by writing, and shall have the privilege to offer any testimony he may desire before final vote thereon.

Upon request of the Secretary, said Board shall convene to determine and adjudicate such matters as are not clearly defined by the Constitution and By-Laws, or such other questions as he deems of great importance to the Association.

Four members of the Executive Board shall constitute a quorum for the transaction of business at any meeting, notice by mail having been given each officer ten days prior thereto.

SECTION 7.

QUORUM.

In all the meetings of the Association, fifteen members shall constitute a quorum for the transaction of all business.

SECTION 9.

EXPENSE OF OFFICERS.

The legitimate expenses of officers and the members of the Executive Board, in attending meetings of the Board, shall be paid out of the funds in the treasury of the Association.

SECTION 10.

SHIPMENTS AND PENALTIES.

Whenever, and as often as any mine operator, wholesale shipper, jobber, or their agents, shall sell coal to any person not a regular dealer, except as provided in Art. III, Sec. 3, of Constitution, shipper will be considered as having sold and shipped to a consumer, and the penalty for said shipment shall be fifty cents per ton for each ton of anthracite coal and twenty-five cents per ton for each ton of bituminous coal, smithing coal, or coke thus sold. Whenever the secretary of this Association shall succeed in collecting any claim made against the mine operator, wholesale shipper, jobber, or their agents, upon coal sold to the consumer, as provided in the Constitution and By-Laws, eighty per cent of the sum so collected shall be paid in equal parts to the members of the Association who shall be located at the point where such sale is made, and if there be but one member, then eighty per cent of all the sum so collected shall be paid to him, and the remainder shall be turned into the treasury of the Association.

SECTION 11.

SHIPPERS LOSE STANDING.

Any mine operator, wholesale shipper, jobber or their agents, who shall sell coal direct to a consumer in any town or city where there is a member of this Association shall be deemed as withdrawing from Honorary Membership, and shall not thereafter be included in any printed list of membership, Active or Honorary, unless he shall first have satisfied the reasonable objections of all parties aggrieved.

SECTION 13.

PENALTY FOR NON-PAYMENT OF ANNUAL DUES.

If any member shall neglect or refuse to pay the dues provided by the Constitution and By-Laws of this Association within sixty days after due notice by the secretary, he shall cease to be a member of this Association, and the secretary may strike his name from the rolls.

SECTION 14.

MEMBER'S LIABILITY TO SUSPENSION.

Any member of this Association who shall habitually fail to meet his obligations with the Wholesale Dealers and shall be reported by any dealer to the secretary of this Association shall be cited to appear before the Executive Board, and should he fail to exonerate himself from the charges preferred, to the satisfaction of the Executive Board, he shall no longer be considered a member of this Association and a participant in its benefits. When a member is dropped from this Association for non-payment of debts, the shippers who are honorary members of this Association shall be notified monthly by the secretary

RESOLUTIONS.

The following resolutions were adopted at the semi-annual meeting, held in Milwaukee, Wis., Dec. 14, 1899:

Resolved, that the Executive Board of the Retail Coal Dealers' Association of Illinois and Wisconsin be instructed and they are hereby authorized to amend the Constitution and By-Laws of said Association, so that shipment to railroad companies, where the coal is used for other purposes than operating their lines, or conducting their business of railroading, shall be considered as shipments to consumers.

Whereas, Considerable trouble and many disputes have arisen on account of shipments being made to parties claiming they were going into the coal business, before such parties had properly equipped themselves as regular dealers, as

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provided in the Constitution and By-Laws of the Retail Coal Dealers' Association of Illinois and Wisconsin; therefore be it

Resolved, That shipments to parties claiming that they are going into the business shall be considered as shipments to consumers, if such shipments are made before said parties have the proper equipment, as provided by the rules of the Association.

Resolved, That the Executive Board of the Retail Coal Dealers' Association of Illinois and Wisconsin be instructed and they are hereby authorized to employ a competent attorney as counselor for the Association, and that such attorney's name appear with the list of officers of said Association.

Resolved, That the Executive Board of the Retail Coal Dealers' Association of Illinois and Wisconsin be instructed and they are hereby authorized to change or amend the constitution and by-laws of said Association whenever they have reason to believe that they conflict with the laws of the State of Illinois or Wisconsin.

The pamphlet containing the constitution and by-laws contains this notice:

“NOTICE.

Shippers are urged to refrain from quoting prices or sending circulars and price lists to consumers in towns in which members of this Association are located.”

The statement further recites:

“That previous to the adoption of the resolution which authorizes the executive board to change or amend the constitution and by-laws whenever they have reason to believe that they conflict with the laws of the State of Illinois or the State of Wisconsin, the association was advised by a reputable attorney that the constitution and by-laws, as hereinbefore set forth, was not in conflict with the laws of the State of Illinois or of Wisconsin and that it was not an illegal act for this association to transact business under such constitution and by-laws, which advice the defendants believed and followed in the doing of the acts complained of.”

"That in practice under Section 11 of said by-laws no mine operator, wholesale shipper, jobber, or their agents, has ever been expelled or dropped from the honorary list of membership, and objections have been satisfied either by payment of fines, as provided in the by-laws, or by agreement not to repeat the offense complained of."

"It was not deemed a reasonable objection thereunder to a sale to the consumer, as defined in said constitution and by-laws, if the regular dealer or dealers, as defined therein, doing business at the point of sale, failed to meet his or their financial obligations to the shipper, etc.; or if the wholesaler or shipper, etc., did not know at the time of the sale that the purchaser was not a regular dealer, as aforesaid."

"No compulsion or coercion was exercised by said association over the members thereof to induce them to comply with said constitution and by-laws otherwise than provided therein, if they may be so construed, but each member complied or not with said provisions as he considered his own best interests to dictate."

"The association did not attempt to regulate or fix the price of coal, but, on the contrary, the members of the association were at full liberty to charge whatever price they saw fit."

"Said association never compelled mine operators, wholesale shippers or jobbers or their agents, to violate any contract which they might have already entered into for the sale of coal."

"Penalties were considered as compensation to the retail member or members of the association located at the point where such so-called irregular sale was made, so as to assist such injured member or members to maintain the equipment required in the constitution, and to compensate them for loss occasioned them by sale from the shipper, etc., direct to the consumer."

"Experience in the retail coal business in Illinois and Wisconsin for many years has shown that the cost of handling coal by retailers who are regularly and continuously engaged in the business, is, on the average, over fifty cents per ton; and that fifty cents per ton on anthracite coal and twenty-five cents per

ton on bituminous coal, smithing coal or coke, is no more than a fair, reasonable profit to such average retail dealer for doing the business."

"That the establishment of said association has resulted in some instances in enabling regular retail coal dealers to establish places of business in some localities where before this association was established no retailer could afford to maintain a place of business, so as to keep a supply of coal constantly on hand all the year round to meet the demands of the public; and before the establishment of such retail dealer at such point, the public at such place were compelled to get their supply of coal from distant and inconvenient points at increased expense, or else purchase their coal directly from mine operators, and wholesale shippers or jobbers in car-load lots (which contain from twenty to forty tons of coal per car), or else purchase of scalpers, who would not have a yard or other facilities for keeping a constant supply of coal on hand, but who would occasionally buy one or more carloads of coal, at such times in the year when it could be immediately retailed to consumers."

"A scalper, as understood by said association, is a person who does not have an office, scales, or a place for storing coal, nor does he engage regularly and continuously in the coal business, so as to supply the demands of the public at all times during the year; but on the contrary, a scalper is one who is in the habit of buying one or more carloads of coal, principally in the summer and fall when coal is at a low figure, and then selling it to consumers directly off the car."

"Protection to members of the association was sought to be given by imposition of the penalties prescribed in said by-laws, on offending members."

"The secretary of the association has sent out every three months, or caused to be sent out, a list of the honorary members of the association to the active members thereof; but neither said association, nor the secretary thereof, has since this constitution was adopted ever sent out, posted or distributed any warning, request or notice to the members of said association, or to anyone else, that any mine operator,

wholesale shipper, jobber or any of their agents, whether members of said association or not, should not be dealt with or patronized, or that purchases of coal should not be made of them."

"The executive committee usually convened only twice a year, once just before the annual meeting and once just after."

"Either active or honorary members could withdraw from said association whenever they pleased; and the non-payment of dues effected a termination of membership in the association."

"The term 'legitimate territory' referred to in Article 3, Section 5, of said constitution was understood by the members of said association to include territory naturally tributary thereto through location and lines of travel, but not to include any other city, town or village, where a member of said association was operating a yard and office, except in those instances where a member's place of business outside of said city, town or village was more accessible by the regular and natural route of travel than places of business in such cities, towns or villages.

"But if there were several members or eligible members of said association doing business in the same city, village, town or locality, it was understood that the legitimate territory of each included the whole of said city, village, town or locality, and any member was permitted to establish and operate as many places of business as he desired."

"That on the date of the indictment the members of said association consisted of 424 active members in the State of Illinois, 322 active members in the State of Wisconsin and 70 honorary members. That at said date there were over 1,950 persons engaged in the retail coal business in the State of Illinois and over 325 persons engaged in the retail coal business in the State of Wisconsin, who were eligible to membership in said association but were not members thereof. It is estimated there is sold in Illinois and Wisconsin each year on the average about 25,000,000 tons of coal, of which the railroads consume about one-half, and there is sold in said

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states through the retail dealers who were members of said association about ten per cent of this amount, viz: 2,500,000 tons, about one-third of which is anthracite coal. The honorary members of said association did not include all the mine operators, wholesale dealers and jobbers who sold coal in Illinois and Wisconsin—the entire number being 250. But said 70 members were the principal and largest of said operators, etc.”

“That on November 5, 1902, the following letter was sent out from the headquarters of said association in Cook County aforesaid, by its secretary, the defendant F. E. Lukens, addressed to one of the honorary members of said association, being a wholesale dealer in coal in the City of Chicago aforesaid, to wit:

**“RETAIL COAL DEALERS’ ASSOCIATION
OF ILLINOIS AND WISCONSIN.**

1536 Monadnock Block,

Chicago.

Telephone Harrison 588.

(Omitting names of the officers and Executive Board, which appear on the letter heads.)

Chicago, November 5, 1902. No. 81.

Gentlemen:—

We have six members of our Association living in and doing business at South Chicago. We are informed that you are supplying the Illinois Steel Company with soft coal for manufacturing purposes. We are further informed that the Illinois Steel Company are furnishing a part of this coal to their employes and others. We wish to advise you that this is against the rules of our Association, and such shipments are irregular after the mine operator has been duly notified, unless the manufacturer ceases to divert the coal for domestic use. There is no question but what the sale of this coal by the Illinois Steel Company is greatly injuring and demoralizing the trade in South Chicago. You may not know perhaps that they have been disposing of the coal in this manner, but

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now that you have the information, we hope you will take immediate steps to relieve the situation, which is becoming almost intolerable to the retail dealers in South Chicago.

Kindly let us hear from you at your earliest convenience with reference to the matter, and greatly oblige

Yours very truly,

F. E. LUKENS, Secretary."

"That on January 9, 1903, the following letter was sent out from the headquarters of said association by said secretary thereof, addressed to the same honorary member, as aforesaid, to wit:

(Letter head, name of association and officers and executive board the same as on first letter.)

"Chicago, Jan. 9, 1903.

Gentlemen:—

We have a complaint from Watseka, Illinois, in which it is claimed that Martin & Sweeney, Tile Mfgs., have bought coal from you and are distributing same to private parties, which is against the rules of the Association.

We are also advised that the City of Watseka have bought coal from you, which they have distributed to private consumers, and we would like to hear from you with reference to this matter, and oblige

Yours very truly,

F. E. LUKENS, Secretary."

"That the following circulars were sent out from the headquarters of said retail dealers' association in Chicago aforesaid, by its secretary, at the time of their respective dates, to the honorary members of said association, and to no others, to wit:

(Part of said circulars omitted for brevity.)

(Letter head, name of association and officers and executive board the same as on first letter.)

"May 29th, 1901.

The following parties are reported as being in the market for coal, and that they are not regular coal dealers at the points named, according to the rules of the Association:

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ILLINOIS.

ALGONQUIN.

The Borden Condensed Milk Co.,

Hard coal for employees.

FREEPORT.

The Stover Mfg. Co.,

Hard coal for employees.

LANARK.

E. C. Harpold, of Chicago,

For hard coal.

Runs small electric light plant at Lanark.

Several farmers near Lanark.

Kindly keep this information on file for future reference.

Yours very truly,

RETAIL COAL DEALERS' ASSOCIATION OF ILLINOIS AND WISCONSIN."

(Letter head, name of association and officers and executive board the same as on first letter.)

"June 6, 1901.

The following parties are reported as being in the market for coal, and it is claimed that they are not regular coal dealers at the points named, according to the rules of the association.

ILLINOIS.

WAYNE.

W. S., J. B. and B. Dunham,

Proprietors of the Oak Lawn Farm.

QUINCY.

Knollenberg & Wavering.

Kindly keep this information on file for future reference.

Yours very truly,

RETAIL COAL DEALERS' ASSOCIATION OF ILLINOIS AND WISCONSIN."

(Letter head, name of association and officers and executive board the same as on first letter.)

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"June 6, 1901.

The following parties are reported as being in the market for coal, and it is plain that they are not regular coal dealers at the points named, according to the rules of the Association:

ILLINOIS.

ROCK FALLS AND STERLING.

Will Long.

Keystone Mfg. Co.

HINSDALE.

John Pitts.

STREATOR.

Thad. Russell.

WISCONSIN.

REEDSBURG.

W. A. Stolte.

NEENAH.

Frank Leavens.

Henry Northrup.

MENASHA.

Frank Leavens.

Henry Northrup.

Kindly keep this information on file for future reference.

Yours very truly,

RETAIL COAL DEALERS' ASSOCIATION OF ILLINOIS AND WISCONSIN."

(Letter head, name of association and officers and executive board the same as on first letter.)

"July 1, 1901.

The following parties are reported as being in the market for coal, and it is claimed that they are not regular coal dealers according to the rules of the Association:

ILLINOIS.

HENRY.

J. W. Watercott & Co.

Duke Bros.

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DANVILLE.

T. Conron.
Ed Winters.
Dewitt Frazier.
Frank Lindley.
T. J. Donley.
Chas. Peiwell.
J. W. Kent.

WHEATON.

W. Lamont Odett.

WISCONSIN.

APPLETON.

D. W. Barry.

RIPON.

J. A. Eggleston.

Note 1. That Thad. Russell, of Streator, Ill., makes the statement that he has complied with all the rules of the Association as regards equipment, etc., in which event he will be considered as a regular coal dealer.

Yours very truly,

RETAIL COAL DEALERS' ASSOCIATION OF ILLINOIS AND WISCONSIN."

LEMONT.

A. O'Shaughnessy.

Is not a resident of Lemont; cannot be considered a dealer according to the rules of the Association.

RIDGEFIELD.

F. W. Hartman.

WISCONSIN.

VIROQUA.

Nustad Bros.

Vernon County Lumber & Mfg. Co.

Are not entitled to quotations as manufacturers, as they use a gasoline engine.

Kindly keep this information for future reference, and oblige

Yours truly,

RETAIL COAL DEALERS' ASSOCIATION OF ILLINOIS AND WISCONSIN."

"That in the month of April, 1902, the secretary of said association sent out from the office thereof in the county aforesaid, to its honorary members in and out of Cook County, and only to them, a pamphlet called a 'look-out list,' on the cover of which pamphlet was printed the names of the then acting officers of said association, being the same parties named in the indictment herein so far as their names are the same, a copy of which pamphlet is hereto annexed, and is the only pamphlet of the kind ever sent out, and is as follows, to wit:

The pamphlet referred to has on the first page of its cover the following:

"Look-out List

RETAIL COAL DEALERS' ASSOCIATION

of

ILLINOIS AND WISCONSIN.

Monadnock Block,

CHICAGO."

On the inside of the first page of the cover is the following:
"To Our Wholesale Friends:

"The 'Look-Out' List contains the names of persons who are not regular dealers in coal according to the rules of eligibility of our Association, and are not entitled to buy at wholesale under the rules of the trade, but who may seek to buy coal in car lots at towns where our members are located, and sales made to them will cause an injury to our members and may result in trouble for the shipper. Our wholesale friends are requested to keep this list constantly before them, as it will be a guide and guard against irregular shipments, and we solicit your co-operation to the end that the coal business

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may be mutually profitable in the territory of our organization.

"In considering our own interests we would not forget the interests of our brothers, the mine-operators and wholesalers, and it is our ambition to do all that is possible to the end that every coal dealer, be he shipper or retailer, may realize a reasonable return for his investment.

RETAIL COAL DEALERS' ASSOCIATION OF ILLINOIS AND WISCONSIN.

(Extra copies furnished upon application.)"

Then follows in thirty-two pages an alphabetical list of towns and cities in Illinois and Wisconsin, together with the names of certain individuals and firms at each place.

The list is headed, "Look-Out List."

Following this list of names on page 33 of the pamphlet is the following:

"To our Wholesale Friends:

"Following is a list of manufacturers who under the rules of our Association are entitled to purchase coal at wholesale for manufacturing purposes only; however, shipments made to manufacturers, where the coal is resold or furnished to their employees or others for domestic use, will be considered as irregular and the original shipper will be held responsible according to the rules of the Association. If contracts made for coal with manufacturers contained a provision that such coal is not to be resold or used for domestic purposes, the desired result would no doubt be accomplished.

RETAIL COAL DEALERS' ASSOCIATION OF ILLINOIS AND WISCONSIN."

After this is a list headed "Look-Out List Manufacturers" in Illinois and Wisconsin, containing ten pages, arranged alphabetically.

The last page of the pamphlet is as follows:

**"RETAIL COAL DEALERS' ASSOCIATION
OF ILLINOIS AND WISCONSIN.**

1536 Monadnock Block,
Chicago.

Telephone Harrison 588.

—o—o—o—

OFFICERS:

President, R. C. Brown, Oshkosh, Wis.

Vice-President, W. M. Sanford, Freeport, Ill.

Secretary, Frank E. Lukens, Chicago.

Treasurer, Joseph Vial, LaGrange, Ill.

Attorney, Samuel W. Packard, Chicago.

EXECUTIVE BOARD.

E. H. Keeler, Rockford, Ill.

F. M. Durkee, Lake Geneva, Wis.

Jno. W. Adams, Peoria, Ill.

C. L. Marston, Appleton, Wis.

Frank McGrew, Kankakee, Ill."

The agreed statement of facts then proceeds as follows:

"That the said defendants and each of them claim and insist that a conviction of them, or either of them, under any one of the several counts of said indictment, would deprive them of a right, privilege or immunity guaranteed to them under the Fourteenth Amendment to the Constitution of the United States, and that they each claim and insist that they are entitled to protection in the doing of the acts complained of in the said several counts of said indictment under the provisions of Section 1 of said Fourteenth Amendment to the Constitution of the United States; and that the statutes referred to in the several counts of said indictment, and each of them, are unconstitutional and void, and contrary to the Constitution of the State of Illinois and to said Section 1 of the Fourteenth Amendment of the Constitution of the United States; and especially that the act of the legislature of Illinois entitled, 'An Act to provide for the punishment of persons, copartnerships or corporations forming pools, trusts and com-

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bines, and mode of procedure and rules of evidence in such cases, approved June 11, 1891, and in force July 1, 1891, and as amended by an act approved June 20, 1893, in force July 1, 1893, and as further amended by an act approved June 10, 1897, and in force July 1, 1897, is contrary to the Constitution of the State of Illinois, and to the first section of the Fourteenth Amendment of the Constitution of the United States, and that Section 46, Chapter 38, Division I, of the Revised Statutes of the State of Illinois, Hurd's Edition, 1901, is contrary to the Constitution of the State of Illinois, and to the said first section of the Fourteenth Amendment of the Constitution of the United States."

Then follows a copy of the report made by the special grand jury which found the said indictment above referred to against the said defendants. The jury returned a verdict finding each of the defendants "guilty of conspiracy in manner and form as charged in the indictment and we fix the punishment of each of said defendants at a fine of \$100." Motions for a new trial and in arrest of judgment were overruled and each of the defendants was sentenced to pay a fine of \$100 and costs.

SAMUEL WARE PACKARD and DE FOREST M. NEICE, for plaintiffs in error.

CHARLES S. DENEEN, State's Attorney, and A. C. BARNES, Assistant State's Attorney, for defendant in error.

MR. JUSTICE FREEMAN delivered the opinion of the court.

It is contended that "the formation of this Retail Coal Dealers' Association for the mutual benefit and protection of its members was not 'an illegal act,' much less a criminal conspiracy"; that "the protection of the established local dealers and merchants in any locality from competition with 'scalpers' and peddlers or those who have no permanent established place of business and who do not therefore pay rent and taxes for local privileges is not opposed to sound public policy; that the constitution of the association "imposes only a par-

tial and reasonable restraint upon the business of its members"; that the members "had a legal right for their own mutual protection" to agree together not to buy coal of wholesalers who made it a practice to sell to those in competition with them; that threats not to deal with such wholesalers "are not coercive in the sense of being illegal or wrongful"; that "even if the combination or agreement was of such a character that it was void or non-enforceable on grounds of public policy, yet that does not establish that the combination or agreement was an 'illegal act' or a criminal conspiracy at common law"; that "the expression 'an illegal act injurious to public trade' when used to define a criminal conspiracy at common law, was understood to mean something more than an act that was simply void or non-enforceable because injurious to public trade; and therefore this expression in the statute of 1874 must be construed in harmony with this well known common law construction"; that "it is essential to constitute the crime of criminal conspiracy that in the doing of the act complained of the parties be actuated by criminal intent," and that no such intent existed in this case; that "the Act of 1891 was designed" expressly to provide for the punishment of all persons who become parties to 'pools, trusts and combines,' " and that this "operated to repeal so much of the general Criminal Conspiracy Statute of 1874 as provided for the punishment of parties who conspired to do an illegal act injurious to the public trade in becoming parties to a 'pool, trust or combine.'" (R. S. p. 639-640, Sec. 269 a, Act of 1891.) It is further claimed that certain counts of the indictment are bad in failing to charge a criminal offense and for the alleged reason that "the General Conspiracy Statute of 1874 embraced and superseded all common law offenses (if any existed) for conspiring to do any 'act injurious to the public trade.'" "

The contention that the Act of 1891 operated to repeal a part of the criminal code under which certain counts of the indictment were framed is disposed of by the recent decision of the Supreme Court in the case *Chicago, Wilmington and Vermilion Coal Company et al. v. The People*, 214 Ill., 421,

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page 445, in which it is held that there is "no repugnancy between the enactments." In the same opinion (p. 444) that court also disposes of the contention that certain sections of the criminal code superseded or repealed all common-law offenses in relation to the regulation and fixing of prices and conspiring to do acts injurious to the public trade, and holds "that the common-law offense of conspiracy was not abolished by such statute, but that every conspiracy which was indictable at common law before the passage of the Act was still indictable."

The object and purposes of the Retail Coal Dealers' Association, and its methods, are sufficiently apparent from its constitution and by-laws and the conceded facts. It clearly enough appears that it is a combination, the tendency and manifest intention of which are to prevent general competition and so to control the retail coal trade and enable its members to control prices. Its object is stated in the first Article of its Constitution to be to prevent wholesalers from shipping coal direct to the consumer and small dealer; in other words, to compel such persons to pay tribute to those whom it defines as "regular coal dealers." To constitute such regular dealer and entitle him to membership in the Association he must possess a certain amount of capital, must own or lease a coal yard, keep a set of scales, an office open continuously during business hours involving employment of additional help, must have storage capacity for one or more cars of coal, etc. To all others the wholesaler is forbidden to sell coal. Doubtless there are members of the Association who have themselves risen from small beginnings. They are seeking now to shut the door of opportunity to others who may wish to follow in their steps, to destroy the ladder upon which they have climbed in order to create a monopoly for themselves. Mine operators, wholesale shippers and jobbers who wish to market their coal may become honorary members of the Association. If they do not become such members, however, the result so far as the business of members of the Association is concerned is not left open to conjecture. The members of the Association pledge themselves "to purchase goods of only

those" wholesale dealers "who recognize the principles of this organization," and sell their coal "only through the legitimate channels of the trade." It is sufficiently evident that these channels are intended to run only through the pockets of those whom this Association dubs "regular dealers." Any honorary member who sells coal to any person not a regular dealer is required to pay a penalty of fifty cents a ton for anthracite and twenty-five for bituminous coal, eighty per cent. of which goes to the "regular dealer" at the point of sale. If the sale is made to a consumer in any town where there is a member of the Association the wholesale dealer *ipso facto* withdraws from the Association and loses the business of all its members. Complaints of all kinds go to the Executive Board and their decision is binding upon all members, honorary or regular. Power is given such Board to suspend or expel any member and there is no appeal. Thus the business of dealing in coal, wholesale and retail, in the States of Illinois and Wisconsin is placed at the mercy of an Executive Board, four members of which constitute a quorum at any meeting. It is argued that to protect "regular dealers" who pay rent and taxes, from competition with those "who do not pay rent and taxes for local privileges," is not opposed to sound public policy. The legislation which protects established merchants from the unfair competition of itinerant peddlers and the public from their impositions rests upon a different basis from combinations in restraint of trade. It has never so far as we are advised been recognized as sound public policy to protect those who are able to pay more rent or taxes against legitimate competition in business of those who may be unfortunately unable to pay as much or any rent or possess as much or any taxable property. It may not in these days be an entirely novel view of sound public policy that combinations, the purpose and tendency of which are to make the rich richer and prevent the poor from bettering their condition, should be encouraged or at least not interfered with; but those who take such view are generally regarded as influenced by selfish considerations rather than by any conspicuous hunger and thirst after civic

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righteousness or the public good. Sound public policy refuses to tolerate such combinations and regards them as conspiracies against the general welfare. The law regards them as unlawful and treats them as common law offenses. In *People v. North River Sugar Refining Co.*, 2 L. P. A., 33, referred to in *C. W. & V. Coal Co. v. The People*, 214 Ill., 421, on p. 442, the Supreme Court of New York said "all the cases, ancient and modern, agree that a combination the tendency of which is to prevent general competition and to control prices is detrimental to the public and consequently unlawful."

It is argued that the constitution of the Association imposes only a partial and reasonable restraint upon the business of its members, that there was not a total restraint of trade, but only partial and in the interest of the "regular dealer," that even without any established place of business one could engage in the coal business by paying on the coal he handled fifty cents a ton for hard coal and twenty-five cents a ton for soft coal to the regularly established local dealer to enable such dealer to maintain his place of business all the year around, that "this payment to the established local dealer removed all restrictions on competition," and that by withdrawing from the Association he could "remove all restraint upon himself whatsoever." In other words a dealer, wholesale or retail, can graciously be permitted to do business if he can, although contrary to the rules of this Association, provided he will pay a ruinous tribute to one of its members who is a so-called "regular dealer." By what right, legal or moral, this Association assumes to thus levy tribute we are not advised. As said by Judge Horton in disposing of the case in the Criminal Court, "What legal or vested right have the members of said Association to the patronage of all the consumers of coal in any particular place or locality?" The argument that this combination exercised only a partial and reasonable restraint over trade is scarcely tenable. If it was, nevertheless it is not necessary that it should create a monopoly. It is sufficient if it tends to that end and to interfere with free competition. *U. S. v. Knight*, 156 U. S., 1. It is, we

think, clear that such a combination as that under consideration between wholesale and retail dealers and producers of coal, a necessity of life, "is an act inimical to trade and commerce and detrimental to the public and unlawful, and amounts to a common law conspiracy regardless of what may be done in furtherance of the conspiracy." Such conspiracy to do an unlawful act is indictable at common law, even though the act itself may not be punishable as a crime. C., W. & V. Coal Co. v. The People, 214 Ill., 421-441, et seq., and cases there cited.

The case last cited disposes of most of the contentions of counsel for appellants in the case at bar, and renders it unnecessary for us to review them at length. To do so and consider in detail the views of counsel expressed in elaborate arguments covering several hundred pages would serve no good purpose. The ultimate object of the combination was to give to its members a monopoly in the retail coal business in their respective localities, thus enabling them to regulate prices independent of legitimate and healthful competition. We are of opinion that the verdict and judgment are amply justified by the evidence and the law applicable.

The judgment of the Criminal Court will therefore be affirmed.

Affirmed.

Franklin Union, No. 4, v. The People.

Gen. No. 11,689.

Fred Kitchel v. The People.

Gen. No. 11,670.

Charles Smith v. The People.

Gen. No. 11,671.

John Mucher v. The People.

Gen. No. 11,672.

John Mucher v. The People.

Gen. No. 11,673.

1. JURISDICTION—*what not essential to.* Jurisdiction as between the parties before the court does not depend upon the fact that there are other persons proper or necessary parties who are not before the court; the proceeding may be in this respect irregular but it is not for that reason void.

2. COMPLAINANT—*when capacity of, to sue, cannot be questioned.* It is too late to first question the right of a complainant to maintain his bill on appeal; the question should be raised by demurrer or by plea in the nature of a plea of abatement if the incapacity does not appear on the face of the bill.

3. CONTEMPT—*when court has jurisdiction to proceed with prosecution for.* Where the court clearly has jurisdiction of the subject-matter of the bill of complaint, the fact that the manner of the bringing of the suit may have been irregular does not destroy the right of the court to proceed with the hearing for contempt where such mode of bringing the suit might have been cured by amendment had it been questioned.

4. CONTEMPT—*corporation can be held guilty of.* A corporation, notwithstanding it cannot be attached or imprisoned, may be punished for contempt and fined; the only exception being in the case of a municipal corporation.

5. CONTEMPT—*who may object to disposition of fine paid as punishment for.* It is strongly indicated in this opinion that the State would be the only party that could question the disposition made by the court of a fine paid as punishment for contempt.

6. CONTEMPT—*when affidavits presented upon hearing for, cannot be questioned.* Affidavits presented upon a motion for punishment for contempt should be objected to at the time of presentation and

an objection made at the close of the petitioner's case comes too late.

7. **CONTEMPT**—*how affidavit presented upon hearing for, should be objected to.* An objection to affidavits presented upon such a hearing should be specific in form.

8. **CONTEMPT**—*when affidavits presented upon hearing for, competent.* Affidavits presented upon such a hearing are competent where they are made a part of the petition praying that the respondents be charged guilty of contempt and tend to show the character and progress of the conspiracy which is made the *gravamen* of the charge of contempt.

9. **CONTEMPT**—*when proceeding for, civil.* A proceeding to punish for contempt in violation of a strike injunction is civil and not criminal.

10. **PARTIES**—*when persons become, though not specifically named in the bill as such.* Where a voluntary association appears in a bill as the complainant but the same is signed and specifically consented to by an endorsement thereon by all the individual members of such association, such individual members will be deemed thereby to have become parties complainant thereto.

11. **DECREES**—*when presumption of validity of, prevails.* In the absence of a complete record the decrees of courts will be supported by every reasonable intendment and presumption.

12. **CONSPIRATORS**—*joint liability of.* Where a conspiracy is established, each conspirator becomes responsible for means used and acts done by any conspirator in accomplishing the purpose of the conspiracy.

13. **STRIKES**—*picketing in connection with, unlawful.* Picketing in connection with a strike, having for its object the compelling of an employer to increase the wages of its striking employees, is unlawful and, where continued in defiance of an injunction, constitutes ground for punishment both of the corporation enjoined, by a fine, and of the individual members thereof by fine or imprisonment.

14. **CERTIFICATE OF EVIDENCE**—*effect given to recitals of.* The recitals of evidence in the certificate of evidence or bill of exceptions are conclusive upon the reviewing court.

Prosecutions for contempt, etc. Appeals from and error to the Superior Court of Cook County; the Hon. JESSE HOLDOM, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1904. Affirmed. Opinion filed October 6, 1905.

Statement by the Court. These appeals are by agreement consolidated with No. 11639, Franklin Union No. 4

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v. The People, etc., for the purposes of hearing, the record in No. 11639 being considered in No. 11670, No. 11671, No. 11672 and No. 11673, and only one set of abstracts and brief for the respective parties being filed in the several cases.

The five cases are a writ of error and appeals from decrees of the Superior Court of Cook County punishing the plaintiff in error and appellants for alleged contempt for violations of an injunction issued on the 10th day of October, 1903, upon a bill filed by an association called the Chicago Typothetae, on behalf of its members who joined with it in the bill, against Franklin Union No. 4 and others. The appeals of Smith, Kitchell and Mucher are from decrees sentencing each of the defendants to thirty days imprisonment in the county jail and to pay a fine of \$100 each, except in No. 11673, which is an appeal from a decree sentencing John Mucher for another violation of the same injunction to imprisonment in the county jail for thirty days. The writ of error is prosecuted by Franklin Union No. 4 from a decree imposing a fine on the Union of \$1,000.

The bill was filed to obtain an injunction against interference with the business of the several complainants by the Franklin Union and its members who had inaugurated a strike and were adopting, as it alleges, violence, intimidation and other forms of interference with and obstruction to the business of the complainants. The bill in its scope and character and the relief prayed for by way of injunction is identical in substance with the case of Christensen v. Kellogg Switchboard & Supply Co., 110 Ill. App., 61. It does not appear to be necessary, therefore, to set out in detail the allegations of the bill and the prayer for relief.

The complainants R. R. Donnelly & Sons Company, W. F. Hall Printing Company, Marsh & Grant Company, Faithorn Printing Company, Rogers & Company, S. D. Childs & Company, Shea Smith & Company, Jefferson Theater Program Company and A. R. Barnes & Company are members of the Chicago Typothetae, a voluntary association organized for the purpose of advancing and improving the

printing and binding business engaged in by them in the City of Chicago, and for the purpose of employing skilled mechanics whose services may be required by its members. A contract had been entered into between the Chicago Typothetae, on behalf of its members, and Franklin Union No. 4, a corporation, on behalf of its members, regulating the hours, wages and terms of employment between the different members of the Typothetae and members of the Franklin Union. On September 27, 1903, the Franklin Union by resolution repudiated this contract and inaugurated a strike against the members of the Typothetae as a means of enforcing its demand for increased wages. Upon the commencement of the strike on October 5, 1903, the Union and its members established a picket system around the place of business of each one of the complainants, and these pickets and those assisting them endeavored to obstruct and tie up the business of the complainants, and to prevent them and their employes from carrying on their work, as a means of enforcing the demand of the Union for higher wages. The evidence shows that in pursuance of this common purpose, working girls returning home from complainants' places of business were pounded into insensibility by the strikers, one girl being assaulted twice. Men were assaulted, and threats, vile language and various forms of intimidation were used to frighten or coerce employes of complainants into leaving their employment. After this state of affairs had continued nearly a week the bill was filed and upon due notice to the defendants the injunction was issued.

By leave of court an amended and supplemental bill was filed November 18, 1903, in which all of the original complainants and C. H. Morgan Company were joined as parties complainant. This was allowed without prejudice to the injunction, which was extended to the amended and supplemental bill.

On October 16, 1903, a petition was filed which was amended and supplemented on October 21, 1903, by a petition charging that appellants Charles Smith, Fred Kitchell and John Mucher on the evening of October 16, 1903, as-

saulted three of the employes of Donnelly & Sons Company while leaving the company's place of business near the corner of Clark and Polk streets, Chicago, and that said Kitchell, Smith and Mucher had since the issuing of the injunction been guilty of picketing and patrolling the streets near to the place of business of the complainant R. R. Donnelly & Sons Company with other evil disposed persons for the purpose of intimidating the employes of the company and preventing them from rendering their services and discharging their duties as employes of said Donnelly & Sons Co. With the petition were filed a number of affidavits as exhibits, stating specifically the acts charged against the three respondents above named. A rule was entered requiring the respondents to show cause why they and each of them should not be punished for contempt of court, and they each filed written verified answers. The answers do not purport to deny any facts alleged in the petition. The answer of respondent Mucher states that he is not a member of Franklin Union and that he did not know of the injunction. The answers of respondents Smith and Kitchell say that they did not know of the injunction.

A hearing was had upon the petition and answers and evidence taken by affidavit and otherwise, and on November 6, 1903, an order was entered finding that each of the respondents with knowledge of the injunction had been guilty of violating it, as shown in the petition and the affidavits filed in support thereof. The order contains specific findings of the acts of each respondent and the times and places. The order directed the issuance of an attachment against each of the then respondents. They appeared the following day and the court entered the orders appealed from.

While these proceedings against Mucher and the other respondents were pending, Mucher, as appears from a second petition filed November 2, 1903, and affidavits filed in support thereof, continued his picketing, threatening and assaulting. A rule to show cause was entered upon him under this second petition. He appeared and answered and a hearing was had, and on November 12, 1903, an order was

entered finding that Mucher and others, with knowledge of the injunction, had violated it, and finding the acts and facts constituting the violation. The matter was then continued from time to time until December 12, 1903, when a final order was entered, reciting the prior proceedings and the judgment of contempt under the prior petition and sentencing Mucher to imprisonment in the county jail for thirty days.

On November 20, 1903, a petition was filed against Franklin Union No. 4 and Charles F. Woerner and John M. Shea, respectively president and secretary of the Union, charging the Union with repeated violations of the injunction and specifying the particular clauses of the injunction which it had violated. It averred that the Union and its officers had maintained a picket system around the premises of each of the complainants, and caused their places of business to be patrolled and watched by a force of pickets daily since the injunction was issued for the purpose of intimidating the employes of complainants and persons seeking employment, and of preventing by intimidation and force the complainants from conducting their business; and that the effect of maintaining this picket system had been to produce disorder in the neighborhood of their business places with the result that numerous assaults had been committed upon complainants' employes and persons seeking employment; that employes and others had been frightened away by the pickets and that the respondents persisted in maintaining their unlawful picket system with knowledge that the assaults were the direct outcome thereof and that they directed, aided and assisted in its maintenance. With the petition were filed a large number of affidavits as exhibits. The petition prayed for a rule requiring the Union to show cause why it should not be punished for violating the injunction and for aiding, abetting and assisting others in its violation. The petition was afterwards dismissed as to Woerner and Shea.

The Union filed a written answer, verified by Woerner, its president, in which it expressly denied most of the allegations of the petition, and claimed that it had always been

obedient to the injunction and had never been a party to any unlawful act, and that it had through its officers ordered and directed and advised its members against any unlawful act, and to conduct themselves in a polite and gentlemanly way.

Upon a hearing of the petition and answer, the court entered an order finding the Union guilty of contempt of court, as charged in the petition, and imposing a fine of \$1,000. The order contains findings of continuous violations of the injunction by the Union from the time it was granted and of aiding and abetting others in the violation of it. The judgment imposing the fine directed that unless it was paid within ten days execution should issue, and reserved for determination, until after the fine should be collected, the question of paying the whole or a part of it to the complainants for their damages and expenses therein.

DICKSON & BLOOMINGSTON, for plaintiff in error and appellants.

TENNEY, COFFEEN & HARDING and ALLEN & WESEMANN, for defendants in error; HORACE KENT TENNEY and JAMES H. WILKERSON, of counsel.

MR. PRESIDING JUSTICE SMITH delivered the opinion of the court.

It is contended on behalf of plaintiff in error Franklin Union No. 4 and appellants that the bill does not set up any jurisdictional facts, and for that reason the injunction was void *ab initio*. In support of this contention it is urged that the bill is brought by the Chicago Typothetae, a voluntary association, for and on behalf of R. R. Donnelly & Sons Company and others, members of the association, and that the association is simply an employment bureau for its members and has no interest otherwise in their business and therefore it could not move the court to action upon the rights of its members.

At the foot of the bill following the verification appears the following: "We the undersigned, members of complainant association, hereto affix our seals and consent and request

that action be brought in court by the filing of the foregoing bill of complaint." This is signed by the members of the Chicago Typothetae, for whom and in whose right the bill was filed and the relief prayed.

If, upon this state of the record, it be conceded for the purpose of argument that the members of the Chicago Typothetae who signed the foregoing request did not thereby become parties to the bill, the court did not fail for that reason to acquire jurisdiction over the parties who were served. Jurisdiction as between the parties before the court does not depend upon the fact that there are other persons proper or necessary parties, who are not before the court. The proceeding may be in this respect irregular, but it is not void. *Board of Supervisors v. The Mineral Point R. Co. et al.*, 24 Wis., 93; *Keyes v. Ellensohn*, 82 Hun, 13, affirmed 144 N. Y., 700.

We do not find from the record that appellants or plaintiff in error in any proper way questioned the capacity of the Chicago Typothetae to maintain the bill. This should have been done by demurrer, or plea, in the nature of a plea in abatement, if the incapacity does not appear on the face of the bill. It is now too late to raise the question. *City of Chicago v. Cameron*, 22 Ill. App., 91; *Ada Street M. E. Church v. Garnsey*, 66 Ill., 132.

This is a jurisdictional question. The test of jurisdiction must be found in the allegations of the bill. Under these the court had the power to enter upon the inquiry, whether the pleadings were in every respect formal or otherwise. Jurisdiction of the subject-matter clearly appeared from the allegations of the bill. That the alleged defect in the manner of bringing the suit was one which could be remedied by amendment cannot be doubted. "What is amendable is not void." *Kruse v. Wilson*, 79 Ill., 233; *Bassett v. Bratton*, 86 Ill., 152; *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 181 Ill., 582; *Johnson v. Miller*, 50 Ill. App., 60.

We think, however, that the firms and corporations who signed the bill in the manner above indicated were parties to the bill and were bound and would be bound by the pro-

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ceedings as effectually as if they had signed the bill in the ordinary and more formal way. The bill was filed and the relief was asked for in their behalf, and it was based on their right. Although the form and manner of their signatures to the bill is unusual, it is in essence and substance their bill signed by them. In addition to this, on November 18, 1903, upon due notice, an amendment to the bill was made in which all the parties who had joined in the written request above quoted, and C. H. Morgan Company, joined as parties complainant. This amendment was made by leave of court without prejudice to the injunction which was extended to cover the amended bill and the new party complainant. Nothing is urged against the sufficiency of the amended bill. Moreover, irregularities and errors in proceedings antecedent to contempt proceedings are not available as a defense to the contempt proceedings, where the court has jurisdiction of the parties and the subject-matter. *Christensen v. The People*, 114 Ill. App., 40, and cases there cited. Our conclusion therefore is that the injunction was valid, as against all defendants, and others who had notice of it. *O'Brien v. The People*, *Chicago Legal News*, Vol. 37, p. 365.

The record does not contain any certificate of evidence in the contempt proceedings against John Mucher, Fred Kitchell and Charles Smith. No question is involved or raised as to the sufficiency of the evidence to warrant the findings of the court as expressed in the orders affecting these respondents. The records in these appeals contain nothing but the petitions, answers and final orders and appeal bonds. The findings of the orders are sufficient. In the absence of a complete record the decrees of the Superior Court will be supported by every reasonable intendment and presumption. *King v. King*, 215 Ill., 100. No question arises upon the merits of these cases, therefore, which this court is called upon to consider.

It is contended on behalf of plaintiff in error Franklin Union No. 4 that in this state a corporation can only be punished through its officers or those acting in aid of it; and *Sercomb v. Catlin*, 128 Ill., 556, and *Hughson v. The People*,

91 Ill. App., 396, are cited as stating the law in this state upon this point.

Sercomb v. Catlin was a proceeding against a business manager of a foreign corporation having a branch office in this state, for refusing to obey an order directing him to dismiss an attachment in favor of the corporation against a firm for whose property and effects the court had appointed a receiver. We think the statement in the opinion in regard to punishing a corporation must be taken to apply to the facts of the case before the court, and as the context clearly shows the statement has reference to the manner of obtaining jurisdiction of the corporation in a proceeding against it. The question now under consideration was not before the court.

In Hughson v. The People, 91 Ill. App., 396, the proceeding was likewise against the officer and not against the corporation. In re Western Marine Fire Ins. Co., 38 Ill., 289, cited in the above case, it is distinctly held that where a court makes a particular person a depository of its funds such person becomes *pro hac vice* an officer of the court and for failure to obey an order of the court relating to the funds he is guilty of contempt and makes the same rule applicable to a corporation having court funds.

The rule now generally recognized is thus stated in the American & English Encyclopedia of Law, Vol. 7, p. 847: "Formerly it was thought that a corporation could not be held liable for contempt, as, by reason of its impersonal nature, it could not be attached. And there are *dicta* to this effect in some of the late cases. The weight of modern authority, however, is against this doctrine. While a corporation cannot be attached or imprisoned it may nevertheless be guilty of a contempt in disobeying or violating an order or decree of court, as it may be guilty of a tort or crime, and it may be fined therefor, and its property sequestered."

That a corporation may be dealt with and punished for a contempt of court is sustained by abundant authority: Rapalje on Contempts, Secs. 1 and 48; High on Injunctions (3d Ed.), Sec. 1460; U. S. ex rel. Southern Express

Co. v. Memphis & Little Rock R. R. Co., 6 Fed. Rep., 237; Wells Fargo & Co. v. Oregon Ry. & Nav. Co., 19 Fed. Rep., 20; Cook on Corporations, Sec. 15b; Commonwealth v. Proprietors of New Bedford Bridge, 2 Gray, 339; Commonwealth v. Pulaski County Agricultural Assn., 92 Ky., 201. The only exception to the rule is that of a municipal corporation, but its officers may be dealt with for any violation of the orders of court. This exception rests on special grounds. No reason exists in the nature and organization of a private corporation for its exemption from punishment and therefore from the control of the courts. On the contrary every sound reason makes for as full control of a corporation, in so far as it or its property may be reached, as of the individual. Upon its organization it becomes a legal entity, liable for its torts and criminal acts. It may be indicted, fined and stripped of its charter, and incidentally its officers may be imprisoned. It would be monstrous to suppose that the law creates a legal organization, clothing it with powers and rights and affording it protection, which it cannot discipline and control. A corporation is liable for negligence, which is a violation of duty, and we see no reason in common sense or law why it should not be fined for a contempt of court, which is a violation of duty.

The order imposing the fine upon the plaintiff in error Franklin Union No. 4 reserves for determination until after the fine is collected the question of paying the amount or any part thereof to the complainants for their damages and expenses in this case. It is urged by the Franklin Union that this provision of the order absolutely vitiates and nullifies the order because the court exceeded its authority in providing indemnity to the complainants. It is to be observed that the order does not direct that the fine when collected or any part of it shall be paid to the complainants. It simply reserves that question for determination after the fine is collected. When that question arises, if it ever does arise, the question of power in the court to take the suggested action will be presented, and the authorities cited by counsel for plaintiff in error may be in point. We cannot now assume,

because of the reservation, that the court will hereafter make an erroneous order with reference to the fine after it is collected. If the fine is collected plaintiff in error will then *ipso facto* cease to have any interest in it, and it is doubtful whether it can object to any disposition of it which the court may make. The state on the one hand, and the complainants on the other, will then be the only parties interested in the disposition of the fund. Further than this we do not deem it necessary to go in passing upon this contention. Any discussion at this time of the power of the court to apply the fine when collected to damages and expenses suffered and paid by complainants would be a consideration of an academic question not presented to the court by this record.

At the time the petition in the contempt proceedings was filed against the Franklin Union there were certain affidavits on file in the original case against the Union, setting forth acts in violation of the injunction. These affidavits are expressly referred to in the petition filed against the Union and are made a part of it. Being a part of the petition, and the facts stated therein being the basis in part of the contempt proceedings, the chancellor heard and considered them. It is claimed on behalf of plaintiff in error that the court erred in receiving these affidavits. With this contention we do not agree. According to the abstract of record filed in these cases the objection to the consideration of these affidavits was not made at the time they were presented to the court, but was made at the close of the petitioners' case. The objection should have been made when the affidavits were presented. *Hanford v. Obrecht*, 49 Ill., 149.

The objection as it appears in the certificate of evidence reads: "On the hearing of said cause counsel for defendants objected to the reading of affidavits filed in the cause prior to the filing of the petition of November 21, 1903." No particular affidavits are specified. No ground of objection is stated. The objection considering the time it was made and its form was not sufficient. *McDonald v. Stark*, 176 Ill., 456; *C. P. & St. L. Ry. Co. v. Nix*, 137 Ill., 141; *Mackin v. Haven*, 187 Ill., 480. But we think the affidavits

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were competent on the broad grounds that they were made a part of the petition and that a conspiracy was alleged to exist. The theory of the bill and the petition is that a conspiracy originated when the Union ordered the strike and continued until the petition was filed; and the affidavits were competent as tending to show the character and progress of the conspiracy during the whole period. *State v. McCahill*, 72 Iowa, 111; *Christensen v. The People*, 114 Ill. App., 40.

The principal remaining question for determination is whether the court erred in finding, under the evidence, that plaintiff in error, Franklin Union No. 4, did not show cause in answer to the rule, and in punishing it for violation of the injunction.

The evidence shows that the strike was instituted by Franklin Union No. 4 and conducted by it. At a special meeting of the Union on September 27, 1903, the agreement between the Union and the Chicago Typothetae representing complainants, regulating wages and terms of employment, was repudiated by the Union. It was also resolved by the Union at the same meeting that in case the present demand for higher wages terminates in a strike, no strike benefits be paid for the first week of the strike. A special assessment was also levied which was to continue during the entire strike, until suspended by the Union, those on a strike being excused from payment while they are on a strike, but the assessment was to be enforced as soon as they secured work. It was also voted to engage suitable headquarters on the south and west sides of the city for the purpose of transacting the business of the Union in regard to the strike. A strike committee, a conference committee and a visiting committee were then appointed. The strike commenced October 5, 1903, and pickets were immediately placed around the places of business of the complainants. A regular system of picketing was maintained from the commencement of the strike to the date of filing the petition against the Union. Strike headquarters were established in accordance with the resolution of the Union at No. 14 Custom House Place, in the vicinity of the places of business of complainants. The evi-

dence shows that the Union, plaintiff in error, prepared for, organized and conducted the strike, and furnished the sinews of war, through its special assessment, by which the contest was waged. It also provided itself with a convenient place in the immediate vicinity of the places of business of complainants, from which it could the better direct its picketing and watch the progress of events, and the results of the methods employed. The natural and inevitable consequence of these measures was that a condition of disorder, violence and bloodshed prevailed, which was discreditable alike to the Union and its members. No respect was shown for either age, sex, condition or public authority. Women were knocked down, beaten and almost killed. Employes of complainants were attacked by strikers even when being escorted by the police. In addition to acts of violence, threats, intimidation, attempts to induce employes of complainants to leave the service of their employers, by bribery and otherwise, and other acts in violation of the injunction, are shown by the record. The pickets and picket lines were so placed in and along the streets and alleys and approaches to the places of business of the complainants that complainants' employes were obliged to pass through and along these lines. The evidence shows that the attitude of the pickets was ugly and threatening and well calculated to cause fear in the mind of any ordinary person. The evidence contained in the record is voluminous, and it is quite impossible to discuss it in detail without extending this opinion beyond reasonable limits. The record shows upwards of twenty-five actual assaults upon employes of the complainants, many of them being of a serious nature. The testimony tends to show a large number of instances of threats and intimidations of such employes by those engaged in the strike, that the "visiting committee" of the Union was actively engaged in persecuting and trying to frighten employes of complainants into giving up their positions with complainants; that when members of the Union were brought into court for violations of the injunction in this case they were defended by the attorneys for the Union, and Woerner, president, and Shea, secre-

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tary and treasurer of the Union, who disbursed the strike benefits, were present at the hearings. It was proved that in October, 1903, a petition was filed in the original cause against John Mucher, Ed Kitchell and Charles Smith and a rule was entered against them to show cause why they should not be attached for contempt of court for violating the injunction in question, and that they answered and evidence was heard, and that upon all of the various hearings plaintiff in error through its counsel defended them. It appears that the same thing was true upon the hearing of the rule based upon the petition filed on November 2, 1903, against Mucher, Tohill and Lopeth. As a result of those hearings the court found that after the issuance of the injunction, and with knowledge of its issuance, Mucher, Kitchell and Smith had been guilty of violating the injunction and had on October 16, 1903, intercepted and assaulted employes of R. R. Donnelly & Sons Company for the purpose of intimidating and coercing said employes of R. R. Donnelly & Sons Company to leave their employment, and for these offenses punishment was duly imposed upon them by the court. It was also proven that in the proceedings against Mucher, Tohill and Lopeth above referred to they had with others picketed, patrolled and guarded the streets and avenues adjoining the place of business of R. R. Donnelly & Sons Company for the purpose of intimidating, threatening and coercing its employes and persons seeking employment with it, and that they watched, interfered with and intercepted said employes in going from and coming to their work for the purpose of intimidating and coercing them by threats and a display of force to leave the employment of the said complainant. And it was proved that all this was done for the purpose of accomplishing the object of the conspiracy set forth in the original bill of complaint in said cause of Chicago Typothetae et al. v. Franklin Union No. 4 et al., and that for these offenses Mucher, Tohill and Lopeth were convicted and punished by the court.

It further appears that Woerner and Shea stated in court in answer to questions put by the chancellor that plaintiff in

error, Franklin Union No. 4, was continually, after the inauguration of the strike, offering money to the employes of the complainants for the purpose of inducing them to quit said employment and to compel the employers to accede to the demands of the Union and its members to take the members of the Union back into the employment of said complainants at a higher scale of wages, and for that purpose the Union was paying what was called strike benefits of \$5 a week to girls and other employes of said complainants. In answer to questions put by the court Woerner stated that there were about 1,800 members of Franklin Union No. 4, and that about 200 were out on said strike and that the members not out on strike were contributing two dollars each per week to the Union for the purpose of maintaining the fund out of which said strike benefits were paid.

The evidence of Shea, secretary and treasurer of the Union, shows that no record of the disbursements of money during the strike was kept.

The expressed object of the strike inaugurated by plaintiff in error was to enforce its demand and that of its members for higher wages and to compel each one of the complainants to make individual agreements with Franklin Union therefor. This is stated in the resolutions adopted by the Union on September 27, 1903. In paragraph eight of these resolutions it was ordered "that suitable headquarters be engaged on the South and West sides for the purpose of transacting the business of the strike." Thus the plaintiff in error, Franklin Union, not only inaugurated the strike but assumed direction of it, and for the immediate direction and management of it appointed the committees named in the resolutions. And further, in order to furnish the funds with which to carry on the contest, the Union levied "a special assessment of \$2.00 a week, the same to continue during the entire strike until suspended by act of the Union, and to be levied on the entire membership who are employed." Thereupon strike headquarters were established in the vicinity of the places of business of complainants by the Union, and

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from these headquarters the strike was directed and picket lines were established and strike benefits were disbursed.

The question is, does the evidence in the case connect the Union with the conspiracy to injure the business of the complainants and terrify their employees and thereby to force the complainants to comply with the demands of the Union as charged in the bill, and with either knowledge of or acquiescence in any of the acts proven which constitute a violation of the injunction?

The general rules by which the evidence briefly referred to above, and other evidence in the case, must be weighed are clear and well established. The evidence clearly established the conspiracy for the illegal purpose charged in the bill and in the petition for a rule to show cause against the Franklin Union. A conspiracy once established, each conspirator becomes responsible for means used and acts done by any conspirator in accomplishing the purpose of the conspiracy. *State v. McCahill*, 30 N. W. Rep., 553; *Lasher v. Littell*, 202 Ill., 551. The rule with reference to the parties to a conspiracy is expressed in *United States v. Cassidy*, 67 Fed. Rep., 698, as follows: "Where an unlawful end is sought to be effected and two or more persons actuated with a common purpose in accomplishing that end work together in any way in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy, although the part anyone was to take therein was a subordinate one. * * * Anyone who, after a conspiracy is formed, and who knows of its existence, joins therein, becomes as much a party thereto at the time as if he had originally conspired. Where several persons are proved to have combined together for the same illegal purpose, any act by any one of them in pursuance of the original concerted plan and with reference to the common object is, in the contemplation of the law, the act of the whole party, and therefore the proof of such act will be evidence against any of the others who are engaged in the conspiracy."

This court in *Christensen v. The People*, 114 Ill. App., 40, gave an exhaustive review of the law as to conspiracy

and the evidence necessary to establish it. After citing and reviewing many authorities in this state and in other jurisdictions it was said: "Other authorities might be cited, but we know of no well-considered case, or indeed of any case, holding that a combination of persons to injure the business of another is not unlawful. That the appellants and others associated with them acted in concert in unlawfully endeavoring to injure, and in fact injuring complainant's business for an unlawful purpose is fully sustained by the evidence. They conspired, breathed together, to effect the unlawful purpose, and by overt acts did all they possibly could to that end. It is not necessary to prove an express agreement between the appellants and those associated with them. It may be proved by circumstantial evidence. *Spies et al. v. The People*, 122 Ill., 1, 213; *Patnode v. Westenhaver*, 114 Wis., 460. In *United States v. Weber*, 114 Fed. R., 950-953, the court say: 'But if the object of the Union is illegal, or if the methods employed by it, either to induce acquisitions to its ranks or to accomplish its ulterior purposes, are illegal, it appears to be well settled that the persons who combine in such efforts are conspirators,' citing cases. The language quoted is cited with approval in *Ex parte Richards*, 117 Fed. R., 658-668. In *Doremus v. Hennessy*, 176 Ill., 608-614, the court say: 'No persons, individually or by combination, have the right to directly or indirectly interfere with or disturb another in his lawful business or occupation, or to threaten to do so, for the sake of compelling him to do some act which in his judgment his own interest does not require.'"

Applying these principles to the evidence, and taking all the circumstances together there is no room for reasonable doubt that the Union was a party to the conspiracy charged in the bill and that the picketing was established and continued under the direction of plaintiff in error through its officers and strike committees. No other conclusion of fact upon this point under the evidence could be entertained for a moment by any sane and unprejudiced mind. The evidence sustains this conclusion by a probative force producing a

moral certainty. The picket system once established, the intimidation, assaults, slugging and bloodshed followed as naturally and inevitably as night follows day. There can be no such thing as peaceful, "polite and gentlemanly" picketing, any more than there can be chaste "polite and gentlemanly" vulgarity, or peaceful mobbing or lawful lynching. As counsel for plaintiff in error says in his brief: "In these days of industrial strife the non-union man acts on the union man as the red rag on the violent bull, and the average union man apparently needs no incentive by way of direction or authority, from his fellows, so bitter has the feeling become, to promptly endeavor to exterminate the 'scab' at sight." Certainly then, if the union man has a union behind him and a picket line supporting him he will "promptly endeavor to exterminate the 'scab' at sight." This is as well known to the public as it is to counsel. Consequently the mere fact of a picket system being established by men known to be unfriendly constitutes and is a threat of physical violence and an intimidation to the peaceful man. Some men can be intimidated only by being knocked down, but most peaceful law-abiding men can be and are intimidated by an array of unfriendly men who are known to be so brutal and depraved that they not only assault men, but even women and girls. The peaceful and law-abiding man or woman is entitled to come to and go from his or her work through the public streets of a civilized community in peace and quiet without even a mental disturbance as to his or her perfect safety.

It is idle to talk of picketing for lawful persuasive purposes. Men do not form picket lines for the purpose of conversation and lawful persuasion. Such picketing as is established by the evidence in the case at bar is intended to annoy and intimidate, whether physical violence is resorted to or not, and is unlawful in either case. Courts should be practical. When they form an opinion from evidence it must be a practical one. They should touch earth at every step. They have no opportunity, no license for star-gazing or for indulging in poetic fancy. In imagination and in theory a peaceful picket line may be possible, but in fact a picket line

is never peaceful. It is always a formation of actual warfare and quite inconsistent with everything not related to force and violence. Its use is a form of unlawful coercion.

The Union and its members had the legal right to demand higher wages of complainants, either with or without good reason. The members of the Union also had the legal right to quit work as individuals or collectively, as a means of enforcing their demand. But the Union or its members had no legal right to interfere with the business of complainants or to disturb them in their lawful business or occupation, as was done in this case, for the purpose of compelling them to make agreements with the Union or its members as individuals in regard to the wages to be paid. It must, therefore, be held responsible for the illegal acts in violation of the injunction disclosed by the evidence. It cannot relieve itself from this responsibility by instructing or pretending to instruct its members to be orderly and to obey the law, while it was at the same time engaged in effecting an unlawful end in an unlawful manner. The facts proved by the evidence offered by petitioners overcome and disprove the evidence on behalf of the Union as to such instruction and advice, and as to the ignorance of its officers of what was being done by its members and others. They knew as a matter of fact, and they were bound to know as a matter of law, the natural and inevitable consequences of the illegal conspiracy which the Union and its members had formed and the measures which it and they had adopted to accomplish its object. The Union was the main factor in the conspiracy and by reason of its money and its control of its members it was the real power back of the whole scheme. Under the authorities cited above and many others and the evidence the Union must be held guilty of wilfully violating the injunction, and it must suffer the consequences.

Other questions are presented in the briefs of counsel which we do not deem it necessary to discuss fully. We will indicate briefly our views upon them. It is claimed that substantial injury must be shown before punishment can be inflicted for violating an injunction. Substantial injury is

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clearly shown by the evidence. It is urged that the contempt charged herein is criminal. The proceeding was civil and in no sense criminal. *O'Brien v. The People, supra*. We do not regard the punishment inflicted by the court as excessive under the evidence. Counsel for plaintiff in error claim that the court below erred in admitting into the certificate of evidence matter not properly a part thereof. This is not supported by an affidavit even. It rests solely on the assertion of counsel. But the recitals of evidence in the certificate of evidence or bill of exceptions are conclusive upon a reviewing court. *Goodwin v. Durham, 56 Ill., 239*.

We find no error in the records. The order as to each of the appellants in Nos. 11670, 11671, 11672 and 11673 is affirmed. And in this case No. 11639 the order as to the plaintiff in error is affirmed. Separate judgments will be entered in each case.

Affirmed.



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